LECTURE

JUDICIAL INDEPENDENCE AND THE RULE OF LAW

by
*Judge D. Brooks Smith**

INTRODUCTION

Good evening, everyone. Having been offered the opportunity to speak on a subject of my choice, I've chosen a topic that has been much on my mind in recent years—one that I hope I have some credibility talking about—judicial independence. Over the past 35 years as a federal judge, I've witnessed firsthand the critical

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role that an independent judiciary plays in protecting the rule of law. I've also seen the judiciary's independence tested and even explicitly questioned, perhaps suggesting a trend in recent years. I've found that history—the roots and development of judicial independence, and threats to judicial independence over the centuries—is a particularly helpful lens through which one can understand and contextualize current events and discourse surrounding an independent judiciary. So that's how I've structured this talk: I'll trace the historical development of judicial independence as a settled norm of American law, then address what I see as a heightened pattern of threats to that norm in recent years.

I. EARLY HISTORY

The independence of the judiciary, like most facets of the American legal system, has its roots in English common law. In pursuit of absolute power, the English monarchs of the early modern period removed from office any judge who stood in their way. For instance, when Sir Edward Coke asserted the judiciary's authority to review acts of Parliament and even to dictate law to the sovereign, King James I swiftly removed Coke from the bench.[1] Some judges were less fortunate, paying for insubordination with their lives.[2] In response to such "indignities," Parliament passed the Act of Settlement, which provided judges, for the first time, with tenure during good behavior, fixed salaries, and removal only upon the request of both houses of Parliament.[3] In time, this became a settled norm of Britain's unwritten constitution, and none other than King George III publicly affirmed judicial independence as "essential to the impartial administration of justice, as one of the best securities to the rights and liberties of [his] loving subjects, and as most conducive to the honour of the crown."[4]

Lacking such royal approbation, the state of judicial independence in the American colonies was less auspicious. When colonies tried to establish their own judiciaries, the royal Privy Council in England sometimes withheld authorization.[5] Even where colonial courts were established, those courts remained outside the

[1] Charles A. Riedl, *The Administration of Justice as Affected by Insecurity of Tenure of Judicial and Administrative Officers*, 22 MARQ. L. REV. 38, 42 (1937).

[2] PHILO-DICAIOS, THE TRIUMPHS OF JUSTICE OVER UNJUST JUDGES 8 (S. Kneeland & T. Green 1732) (1680).

[3] Riedl, *supra* note 1, at 42–43 (citing John Adams, On the Independence of the Judiciary: A Controversy Between W. Brattle and J. Adams (1773), *reprinted in* 3 THE WORKS OF JOHN ADAMS 513, 529 (Charles Francis Adams ed., 1851)); *see also* Act of Settlement 1700, 12 & 13 Will. C. 2, § 3 (Eng).

[4] 15 PARL. HIST. ENG. 1007 (1761) (The King's Speech respecting the Independence of the Judges), *quoted in* Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 681 (1980).

[5] Kaufman, *supra* note 4, at 681.

scope of the Act of Settlement's protections for judges, and English monarchs were quick to impose restrictions on judicial tenure in response to colonial courts' willingness to entertain challenges to imperial commands.[6] The colonists found these restrictions deeply offensive, and the Founding Fathers' objections to the practice found their way into the Declaration of Independence and, eventually, the Constitution.

Because the Framers' experience with threats to judicial independence overwhelmingly involved manipulations of tenure and salary, a primary objective of Article III of our Constitution was to guarantee judges' tenure and salary, thereby insulating them from political interference.[7] The Constitution represented, at least in the abstract, an acceptance of the idea that only impartial judges could administer justice—and that judges reliant on Congress or the Executive for their station or salary could never be truly impartial.

But it is clear from the Founding Generation's actual practice that it was not immune from the tendency toward power-seeking. Just over a decade after ratification, Congress passed the Midnight Judges Act, which established a number of new judgeships to be filled by allies of the outgoing Adams administration.[8] This was, at its core, an attempt to alter the composition of the judiciary for purely political purposes.

Soon in power, the Democratic-Republicans repealed the Midnight Judges Act in an effort to "undo" the new judgeships.[9] They also immediately brought forth impeachment proceedings against two judges, Justice Samuel Chase and Judge Pickering—narrowly failing with regard to the former but succeeding as to the latter.[10] Like the Midnight Judges Act, these impeachments were broadly understood to be politically motivated.[11] They therefore constituted a direct attack on judicial independence. They also demonstrated that the founding generation, no less than King George III, could elevate judicial independence with one hand while undercutting the judiciary with the other. But unlike in the Colonial Era, during these years our Constitution at least mitigated the ability of raw-power politics to subject judges to its will.

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[6] *Id.* at 682.

[7] Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT L. REV. 31, 47 (1998).

[8] Sam J. Ervin, Jr., *Separation of Powers: Judicial Independence*, 35 LAW & CONTEMP. PROBS. 108, 118 (1970).

[9] *Id.*

[10] Jed Glickstein, Note, *After Midnight: The Circuit Judges and the Repeal of the Judiciary Act of 1801*, 24 YALE J.L. & HUMANS. 543, 575–76 (2012).

[11] Frank Thompson, Jr. & Daniel H. Pollitt, *Impeachment of Federal Judges: An Historical Overview*, 49 N.C. L. REV. 87, 95 (1970); *see also* Alexander Pope Humphrey, Address, *The Impeachment of Samuel Chase*, 5 VA. L. REG. 281, 289 (1899) ("That it was a political prosecution from beginning to end cannot, I think, be denied.").

As I've said, the Founding Generation's earliest efforts to ensure judicial independence largely concerned tenure and salary. A challenge brewing under the surface was whether courts could invalidate legislative acts. In the canonical case of *Marbury v. Madison*, the Supreme Court took a definitive stand on this question, claiming for the first time the authority to review the constitutionality of legislation.[12] In doing so, the Court went head-to-head with both political branches, not only invalidating an act of Congress, but also refusing to countenance the President's effort to prevent a duly appointed officer from assuming his position.[13] Chief Justice Marshall, now with the guarantees of tenure and salary that those before him lacked, reasserted the idea that neither the Executive nor the legislature is above the law and that it is the independent judiciary's responsibility to protect the people from overreach by the other branches.[14] Notably though, Marshall declined to issue a writ of mandamus instructing the President to give Marbury his commission.[15] Judicial independence had been established in America, but it remained, shall I say, inchoate.

II. THE "MIDDLE ERA" OF AMERICAN JUDICIAL INDEPENDENCE

In the decades after *Marbury*, the Supreme Court generally exercised its power of judicial review against state governments. Federal court review of actions by the other branches of the federal government was very limited: During Marshall's 34-year tenure as Chief, *Marbury* represented the only time the Court invalidated a federal statute.[16]

In enforcing federal law against the states, by contrast, the Court achieved some notable successes. Beginning with the foundational case of *Martin v. Hunter's Lessee*, the Court repeatedly clarified the supremacy of federal law over state law and the power of the Supreme Court to review state court decisions.[17] The Court reiterated this principle in *Worcester v. Georgia*,[18] in which the Court sided against the state of Georgia in that state's jurisdictional dispute with the Cherokee Nation.

At the same time, the courts experienced some notable setbacks in asserting their authority vis-à-vis the *federal* government. After *Worcester v. Georgia*, President Andrew Jackson reportedly expressed his unwillingness to enforce the Court's order

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[12] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).

[13] *Id.* at 162.

[14] *See* George P. Smith, II, *Marbury v. Madison, Lord Coke and Dr. Bonham: Relics of the Past, Guidelines for the Present—Judicial Review in Transition?*, 2 U. PUGET SOUND L. REV. 255, 261 (1979).

[15] *Marbury*, 5 U.S. (1 Cranch) at 176.

[16] *Table of Laws Held Unconstitutional in Whole or in Part by the Supreme Court*, CONST. ANNOTATED, https://constitution.congress.gov/resources/unconstitutional-laws/ (last visited May 2, 2023); *see* Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 1, 47–48 (2020).

[17] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 342–43 (1816).

[18] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 595–96 (1832).

against Georgia, allegedly stating, "John Marshall has made his decision, now let him enforce it."[19] And lest you think that this lack of respect for the courts simply reflected Jackson's pugnacious temperament, I remind you that 30 years later President Lincoln famously defied a court order which purported to invalidate his suspension of the writ of habeas corpus.[20] Though a full Supreme Court would eventually declare Lincoln's suspension of the writ unconstitutional, and the executive branch eventually complied, the Civil War was, by then, over. The Constitution, it seemed, was a fair-weather friend to the principle of judicial independence.

The Antebellum Period also marked the Supreme Court's most notable misstep: *Dred Scott v. Sanford*.[21] Chief Justice Rehnquist, quoting Chief Justice Hughes, called *Dred Scott* a "'self-inflicted wound' from which it took the Court at least a generation to recover."[22] Squandering the federal authority that it claimed in cases such as *Martin's Lessee* and *Worcester*, the Court sought—unsuccessfully—to tamp down the debate over slavery by removing that debate from the federal stage. In declaring unconstitutional Congress's "Missouri Compromise," which limited slavery's expansion in the northern U.S. territories, *Dred Scott* invalidated an act of Congress for only the second time in the Court's history, and the first time since *Marbury v. Madison*.[23]

Despite this facial assertion of judicial independence and authority, though, *Dred Scott* actually reflected the dangers of political tampering with judicial decision-making. The papers of then-President-elect James Buchanan indicate that he corresponded with several Justices about *Dred Scott* before the opinion was published.[24] Justice John Catron went so far as to suggest that the President-elect "drop Grier" a line—referring to Justice Robert Grier—encouraging Justice Grier to join the Court's majority opinion.[25] I suggest that it is no coincidence that the Court's most shameful hour resulted from such a stark abdication of its independent decision-making authority.

In the half-century that followed *Marbury*, the Court achieved some—but not

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[19] Stephen Breyer, *The Cherokee Indians and the Supreme Court*, 87 GA. HIST. Q. 408, 422 (2003).

[20] James A. Dueholm, *Lincoln's Suspension of the Writ of Habeas Corpus: An Historical and Constitutional Analysis*, 29 J. ABRAHAM LINCOLN ASS'N 47, 48–49 (2008).

[21] Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

[22] William H. Rehnquist, *Remarks of the Chief Justice: My Life in the Law Series*, 52 DUKE L.J. 787, 792 (2003).

[23] *See Dred Scott*, 60 U.S. (19 How.) at 451–52; Kermit Roosevelt III & Heath Khan, *McCulloch v. Marbury*, 34 CONST. COMMENT. 263, 268 (2019).

[24] Philip Auchampaugh, *James Buchanan, the Court, and the* Dred Scott *Case*, 9 TENN. HIST. MAG. 231, 233–35 (1926).

[25] *Id.* at 236 (quoting Letter from Justice Catron to James Buchanan regarding *Dred Scott* (Feb. 19, 1857), *reprinted in* 10 THE WORKS OF JAMES BUCHANAN 106 (John Bassett Moore ed., 1910)).

all—of the broad aspirations it had set forth in that opinion. It would not be until after the Civil War—in a nation then transformed—that the federal courts' nascent independence firmly took root.

A. The Federal Courts During Post-War Federal Expansion

The federal courts' role in enforcing the rule of law grew to reflect the increasing complexity of the post-war economy and society. The people ratified three constitutional amendments that provided unprecedented protection to racial minorities, but which the former Confederate states flouted with impunity.[26] Congress also passed a series of statutes aimed at enforcing these new federal rights, including a provision empowering federal courts to hear cases against state officials accused of violating citizens' constitutional rights—which we know today as Section 1983.[27] Simultaneously, wartime industrialization gave way to peacetime economic boom, presenting the need for courts to intervene in both commercial disputes and regulatory activity. In particular, the rise of railroads made possible for the first time a truly national economy in which interstate commerce was not the exception but the norm.[28] Combined, these economic and political changes resulted in a huge increase in federal law and federal jurisdiction—and with that, an increasingly prominent role for federal courts.

It was during this time that judicial independence, which Americans had preached but had not always practiced since the Founding, crystallized as a bedrock norm of American law.

Most notably, the judiciary proved a critical, if imperfect, redoubt against persistent civil rights deprivations. During this time, federal courts presided over the prosecution of the first Ku Klux Klan. Although the federal courts were extremely unpopular in the South, federal judges persisted. One judge from Maryland, Judge Hugh Lennox Bond of the Fourth Circuit, while hearing cases down in the Carolinas, wrote home to his wife: "I am going to stay here and fight Ku Klux if it takes all summer."[29] The sustained prosecutions would eliminate the first iteration of the Ku Klux Klan in much of the South.[30]

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[26] U.S. CONST. amends. XIII, XIV, XV.

[27] Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (current version at 42 U.S.C. § 1983).

[28] *See* William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875*, 13 AM. J. LEGAL HIST. 333, 341–42 (1969) (quoting member of Senate Judiciary Committee) (discussing enactment of the Jurisdiction and Removal Act of 1875, permitting removal of federal question and diversity suits).

[29] *See* Robert J. Kaczorowski, *Federal Enforcement of Civil Rights During the First Reconstruction*, 23 FORDHAM URB. L.J. 155, 177 (1995) (quoting Letter from Hugh Lennox Bond, U.S. Cir. Judge, to Anna Bond (n.d.) (on file with the Maryland Historical Society)).

[30] WYN CRAIG WADE, THE FIERY CROSS: THE KLU KLUX KLAN IN AMERICA 102, 109 (1987).

The federal courts also considered an increasing number of challenges to state laws[31] and to the growing statutory scheme of federal laws regulating commercial activity: the Federal Employers Liability Act,[32] the Jones Act,[33] the Sherman Antitrust Act,[34] and others.

Naturally, in light of the sheer volume of cases, courts issued some decisions that are still celebrated today and others that continue to draw negative reviews. Of course, courts inevitably get it wrong from time to time. As Justice Robert Jackson famously said, the Supreme Court is "not final because [it is] infallible, but [it is] infallible only because [it is] final."[35] But when courts make severe or inexplicable errors that call their legitimacy into question, they risk undermining their own independence.[36]

This is precisely the position in which the Supreme Court placed itself with the 1895 case of *Pollock v. Farmers' Loan and Trust Co*.[37] Contravening several of its own longstanding precedents,[38] the Court in *Pollock* held unconstitutional the federal Income Tax Act of 1894.[39] Justice Edward White, in dissent, characterized the majority's ruling as based on "the personality of its members" rather than law "hedged about by precedents," and he cautioned that if the Court's rulings were to "depend upon the personal opinions of . . . its membership," the Court would "inevitably become a theatre of political strife . . . without coherence or consistency."[40] The ignominious *Pollock* case, considered then and now to be poorly reasoned and contrary to settled law, would become one of the few Supreme Court rulings to ever be superseded by a constitutional amendment.[41]

Pollock offers a cautionary tale for when judicial independence verges on judicial hubris; or, to paraphrase Plato, when judicial liberty becomes judicial license. Politicians and members of the public roundly criticized the Court's decision, which

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[31] Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 4 CORNELL L. REV. 499, 509–10 (1928).

[32] Federal Employers Liability Act (FELA), ch. 3073, 34 Stat. 232 (1906) (codified as amended at 45 U.S.C. §§ 51–60).

[33] Merchant Marine (Jones) Act of 1920, ch. 250, 41 Stat. 988 (codified as amended in scattered sections of 46 U.S.C.).

[34] Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7).

[35] Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

[36] Roosevelt III & Khan, *supra* note 23, at 269.

[37] Pollock v. Farmers' Loan & Trust Co. 157 U.S. 429 (1895).

[38] *See* Francis R. Jones, *Pollock v. Farmers' Loan and Trust Company*, 9 HARV. L. REV. 198, 198 (1895) (characterizing *Pollock* as overruling "three direct adjudications" made by the Supreme Court).

[39] *Pollock*, 157 U.S. at 583, 586.

[40] *Id.* at 651–52 (White, J., dissenting).

[41] Roosevelt III & Khan, *supra* note 23, at 269 n.21.

was perceived to derive from the Justices' policy preferences rather than the rule of law. Running for President in 1912, Theodore Roosevelt criticized *Pollock* and other turn-of-the-century Supreme Court decisions and called on voters to "emancipate [the courts] from a position where they stand in the way of social justice."[42]

At the same time, *Pollock* offers reassurance to those who fear judicial overreach and is an example of how a democratic society might hold courts in check. Eighteen years after *Pollock*, Congress passed and the people ratified the Sixteenth Amendment,[43] which permitted Congress to enact a federal income tax of the sort that the Court had struck down in *Pollock.* In other words, the system held. *Pollock* may have been shoddily reasoned, even ideologically motivated. Teddy Roosevelt probably made some intemperate remarks suggesting political oversight of the federal courts. But in the end, popular and populist sentiment was directed through the appropriate constitutional channels, and the judiciary remained free of political interference.

B. A Different Roosevelt's Court-Packing Attempt

Two decades later, another President Roosevelt—Teddy's cousin Franklin—similarly found himself facing a decidedly counter-majoritarian Court. Frustrated by a growing pattern in which the Supreme Court struck down his signature legislative accomplishments—and fearing that any future attempts to harness the federal government in support of his policy goals might be similarly stymied—President Roosevelt came up with a plan to manipulate the Court so that it would reach his preferred outcomes: he would appoint additional Justices who shared his political and jurisprudential views.[44]

It is important to note that, in the full sweep of American history, court packing was not unprecedented. The Midnight Judges Act,[45] after all, was the product of the Federalist Party's attempt to pack the lower federal courts with sympathetic judges before the party lost its congressional majorities.[46] And the Supreme Court's size had oscillated during the first 80 years of the nation's existence; most recently, Congress had decreased the size of the Court in 1866 to prevent President Johnson

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[42] Theodore Roosevelt, Candidate for President of the United States, Progressive (Bull Moose) Party, Recorded Campaign Speech Before the National Convention of the Progressive Party in Chicago: Social and Industrial Justice (Aug. 1912) (transcript available at https://www.loc.gov/collections/theodore-roosevelt-films/articles-and-essays/sound-recordings-of-theodore-roosevelts-voice).

[43] U.S. CONST. amend. XVI.

[44] William E. Leuchtenburg, *When Franklin Roosevelt Clashed With the Supreme Court—and Lost*, SMITHSONIAN MAG., https://www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/ (last visited May 2, 2023).

[45] Midnight Judges (Judiciary) Act of 1801, ch. 4, 2 Stat. 89 (repealed 1802).

[46] *See Landmark Legislation: Judiciary Act of 1801*, FED. JUD. CTR., https://www.fjc.gov/history/legislation/landmark-legislation-judiciary-act-1801 (last visited May 2, 2023).

from appointing new Justices, only to increase the size of the Court following President Grant's election in 1868.[47]

Since 1868, though, the Court's membership had remained fixed at nine Justices. And members of both parties quickly criticized President Roosevelt's court-packing plan for contravening the by-then "deeply rooted convention against manipulating Supreme Court size for openly partisan purposes."[48] The Court's independence, in other words, had become inviolable, and Roosevelt's court-packing plan fizzled out. But not before Justice Owen Roberts, a swing Justice who previously voted to invalidate many government restrictions on economic activity, changed course in *West Coast Hotel Co. v. Parrish*[49] and voted to uphold a state minimum wage law in what came to be known colloquially as "the switch in time that saved nine."[50]

It is by no means obvious whether the demise of President Roosevelt's court-packing attempt represented a victory or a loss for judicial independence. Did the plan fail because the norm of judicial independence had become strong enough to hold back even a wildly popular President with large congressional majorities? Or did Roosevelt's scheme simply become irrelevant when a majority of the Court started voting to uphold his policies? If the latter, and more cynical, view is correct, do we see a Court cowed into submission by dangerous populist impulses? Or should we see checks and balances at work—a responsible judiciary that sits above popular sentiment until that sentiment becomes too intense to avoid?

C. Federal Courts Gain Operational Independence

Coincidentally, Roosevelt's attempt to circumvent the judiciary's decisional independence occurred at a time when the courts gained increasing operational independence. This shift began several years earlier, with Chief Justice Taft's successful push to create what is now the Judicial Conference of the United States. Taft acknowledged that the courts had often fallen short in efficiently and effectively adjudicating cases before them,[51] and that those shortcomings sometimes led to

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[47] Marin K. Levy, *Packing and Unpacking State Courts*, 61 WM. & MARY L. REV. 1121, 1128 (2020).

[48] Charles Gardner Geyh, *Judicial Independence at Twilight*, 71 CASE W. RSRV. L. REV. 1045, 1069 (2021).

[49] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[50] *See* John Q. Barrett, *Attribution Time: Cal Tinney's 1937 Quip, "A Switch in Time'll Save Nine,"* 73 OKLA. L. REV. 229 (2020) (explaining origin of the phrase).

[51] *See* Peter G. Fish, *William Howard Taft and Charles Evans Hughes: Conservative Politicians as Chief Judicial Reformers*, 1975 S. CT. REV. 123, 129 (1975) (quoting Taft's 1914 remarks before the House Judiciary Committee).

shoddily-reasoned outcomes like *Pollock*.[52] Yet Taft believed that political attacks on specific judicial decisions fed into a "lack of respect for law and the weakened supremacy of the law."[53] Taft concluded that the best response to objectionable judicial decisions was to professionalize the judiciary, not to politicize it. To this end, he successfully advocated for several reforms that took effect during his time on the Court, including the creation of the Judicial Conference,[54] which studied and managed the administration of the federal courts; the passage of the Judiciary Act of 1925,[55] which expanded the Supreme Court's discretion, via writ of certiorari, to choose the cases it would hear; and the 1934 Rules Enabling Act,[56] which delegated to the Supreme Court the power to prescribe rules of practice and procedure for the federal courts.[57] Taft's successor as chief, Charles Evans Hughes, continued the push for operational autonomy, and in 1939, the Judicial Conference took over responsibility for administering the federal courts from the executive branch.[58] This administrative shift marked the full realization of the operational independence that early English judges sought and the Framers promised. The Third Branch feted its operational independence just this year as the Judicial Conference marked 100 years of serving as the federal judiciary's policy making body.[59] Whether it can be sufficiently protective of decisional independence in the future only time will tell.

III. JUDICIAL INDEPENDENCE: THE MODERN ERA

A. Brown v. Board of Education *and Its Aftermath*

No discussion of the history of our federal judiciary—or of the Supreme Court—is complete without a discussion of *Brown v. Board of Education*.[60] For our purposes, *Brown* points to the rise of two norms that seek to protect judicial independence: one, Congress should not "punish" the Court for making an unpopular decision; and two, relevant parties should comply (or be forced to comply) with the

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[52] Calvin H. Johnson, *Purging Out* Pollock*: The Constitutionality of Federal Wealth or Sales Taxes*, 97 TAX NOTES 1723, 1733 (2002) (quoting 1 Archie Butt, Taft and Roosevelt 134 (1930)).

[53] Fish, *supra* note 51, at 124 (quoting William H. Taft, Address at the Cincinnati Law School Commencement: The Attacks on the Courts and Legal Procedure (May 23, 1914) (transcript available at the Library of Congress at https://www.loc.gov/resource/mss42234.mss42234-582_0020_1175/?sp=737)).

[54] Fish, *supra* note 51, at 135–36.

[55] Judiciary Act of 1925, ch. 229, 43 Stat. 936; *see* Fish, *supra* note 51, at 131.

[56] Rules Enabling Act, ch. 651, 48 Stat. 1064 (1934); Fish, *supra* note 51, at 131.

[57] *See generally* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

[58] Fish, *supra* note 51, at 140–41.

[59] *See* U.S. Judicial Conference Celebrates 100th Anniversary, U.S. CTS. (Mar. 25, 2022), https://www.uscourts.gov/news/2022/03/25/us-judicial-conference-celebrates-100th-anniversary.

[60] Brown v. Board of Education, 347 U.S. 483 (1954).

Court's orders.

I'll start with the second norm. The resistance by Southern state governments to the decrees of *Brown v. Board of Education* and its progeny prompted heated rhetoric, so-called "massive resistance,"[61] and even violence.

The most intense criticism came from Southern governors. Governor Talmadge of Georgia described *Brown* as "ignor[ing] all law and precedent and usurp[ing] from Congress and the people the power to amend the Constitution . . . ."[62] And he colorfully elaborated that the only remaining decision for the Justices was "whether to cut off our heads with a sharp knife or a dull one."[63] The Court's most famous—or infamous—critic was probably Governor George Wallace of Alabama. In his incendiary inaugural address, Wallace directly attacked the Supreme Court for its perceived hostility to "southern values" and segregation, suggesting that—and I quote—the Justices should "put *that* in their opium pipes of power and smoke it for what it is worth."[64]

Southern resistance to desegregation also prompted conflicts that tested the authority of both federal courts and the federal executive branch. Most famously, Arkansas Governor Orval Faubus's refusal to comply with the district court's desegregation order resulted in a standoff between state and federal troops in front of a Little Rock high school. When Faubus deployed the Arkansas national guard to prevent black students from entering their new school, the district court—in an impressive display of independence and commitment to *Brown*—ordered Faubus to disperse the guard and permit the students to enter the school.[65] The governor refused, and President Dwight Eisenhower—though not himself politically enthusiastic about *Brown*—sent in federal troops to enforce the Court order.[66] Eventually, Governor Faubus backed down.[67]

Eisenhower's actions were of monumental importance. To quote Justice Breyer, "[t]hat President Eisenhower dispatched the troops even though his feelings about *Brown* were ambivalent only heightens the extent to which sentiments about

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[61] *"Massive Resistance,"* SEGREGATION IN AMERICA, https://segregationinamerica.eji.org/report/massive-resistance.html (last visited May 2, 2023).

[62] J. Patrick White, *The Warren Court Under Attack: The Role of the Court in a Democratic Society*, 19 MD. L. REV. 181, 185–86 (1959).

[63] *Id.* at 186.

[64] George C. Wallace, Governor of Alabama, Inaugural Address (Jan. 14, 1963) (transcript on file at https://digital.archives.alabama.gov/digital/collection/voices/id/2952/) (emphasis added).

[65] Cooper v. Aaron, 358 U.S. 1, 9–12 (1958).

[66] Lonnie Bunch, *The Little Rock Nine*, NAT'L MUSEUM OF AFR. AM. HIST. & CULTURE, https://nmaahc.si.edu/explore/stories/little-rock-nine (last visited May 2, 2023).

[67] Noah J. Gordon, *The Little Rock Nine: How Far Has the Country Come?*, ATLANTIC (Sept. 25, 2014), https://www.theatlantic.com/politics/archive/2014/09/the-little-rock-nine/380676/.

the judiciary's independence had changed since the days of President Jackson."[68] President Eisenhower's actions demonstrate that the Supreme Court could not be ignored even if its decrees were not in lockstep with the political branches.

A lesser-known part of the story is how Congress reacted to *Brown*. That leads to my other point. Right after the decision was handed down, several congressmen and a senator advocated for impeaching six—or maybe even all—of the Justices.[69] Two senators proposed a constitutional amendment requiring that Justices be reconfirmed by the Senate every four years.[70] One congressman even proposed making the Senate a "court" with the authority to review Supreme Court decisions.[71] This sentiment spilled over into public discourse as well, and "Impeach Earl Warren" billboards sprung up throughout the United States.[72]

These attacks on the judiciary proved to be mostly talk. Throughout this stormy period, the federal courts dealt with, and survived, attacks from Southern states as well as from another branch of the federal government.[73] The Court's durability proved essential when the federal judiciary later "squared off" against a President who abused the power of his office and was prepared to flout the rule of law.

B. Nixon v. United States

At a Third Circuit Judicial Conference some years ago, Justice David Souter shared a story about a visit to his chambers from a young Russian lawyer. Souter gave the young lawyer a tour of the Supreme Court building and was impressed by the young man's extensive knowledge of the Court's opinions. The Russian lawyer then asked Souter which case he believed to be the most impactful of the modern era. Souter quickly replied: *Brown v. Board of Education*, as, I think, most of us would. But the lawyer seemed disappointed with Souter's answer, and so Souter asked his guest which case *he* believed to be the most important. The answer was unequivocal: "The Nixon tapes decision," the young Russian said, "because in my country, the idea that the head of government could be told what to do by the courts is unheard of."[74]

Indeed, the Nixon tapes cases, and the Watergate scandal more broadly, did pose a serious threat to our independent judiciary. Perhaps the most remarkable

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[68] Stephen Breyer, *Judicial Independence: Remarks by Justice Breyer*, 95 GEO. L.J. 903, 907 (2007).

[69] White, *supra* note 62, at 187.

[70] *Id.*

[71] *Id.*

[72] Michael Tackett, *Impeach Earl Warren*, CHI. TRIB. (Sept. 24, 2006, 6:31 AM), https://www.chicagotribune.com/chinews-mtblog-2006-09-impeach_earl_warren-story.html.

[73] *See supra* notes 62–67, 69–71 and accompanying text.

[74] Marjorie O. Rendell, *Civics Tools for Teachers*, 106 JUDICATURE 39, 39 (2022). The Author was in attendance and heard Justice Souter's remarks.

player in that saga was not a member of the Supreme Court, but a lone district court judge, John Sirica. Judge Sirica was, like Nixon, a lifelong member of the Republican Party, and he openly "acknowledged that his work for Republican candidates led directly to his seat on the federal bench."[75]

But politics aside, Judge Sirica demonstrated some of the finest attributes of an independent judge, acting without partisan motive, as cases arising from Watergate began to work their way through the courts. At the time, Judge Sirica was Chief Judge of the District Court for the District of Columbia.[76] Judge Sirica assigned himself the Nixon tapes case precisely because he wanted to ensure that any judgment against the President could not be viewed as an act of partisanship.[77] Throughout the case, Judge Sirica worked to ensure that all the facts saw the light of day in his courtroom, ignoring the political consequences for the President and for the political party responsible for his own appointment to the bench. Indeed, the D.C. Circuit would later characterize Judge Sirica's "palpable search for truth" as representing "the highest tradition of his office as a federal judge."[78]

Case in point: To ensure that the American people learned the truth about Watergate, Judge Sirica refused to quash the subpoenas that the special prosecutor had served on President Nixon seeking, among other things, tapes of Nixon's conversations that were made with recording equipment in the White House.[79] Judge Sirica's order in the so-called "Nixon tapes case" made it all the way to the Supreme Court—which upheld the order in a unanimous opinion, notably written by Nixon appointee Warren Burger and joined by two other Nixon appointees.[80]

Here again, it was important that the Justices did not view themselves as partisan players. Nixon had been evasive about whether he would comply with a court order, and one of the President's attorneys even suggested that the President might not comply with a split decision.[81] But the Court's unanimous opinion made clear that the Watergate scandal was about the rule of law, not politics as usual. Congress turned against the President, and its members did not mince words: defiance of the Supreme Court would be grounds for impeachment.[82] Even the President's "leading

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[75] Francis J. Larkin, *The Variousness, Virulence, and Variety of Threats to Judicial Independence*, JUDGES' J., Winter 1997, at 4, 6.

[76] *Id.* at 5.

[77] *Sirica, 88, Dies; Persistent Judge in Fall of Nixon*, N.Y. TIMES (Aug. 15, 1992), https://www.nytimes.com/1992/08/15/us/sirica-88-dies-persistent-judge-in-fall-of-nixon.html.

[78] United States v. Liddy, 509 F.2d 428, 442 (D.C. Cir. 1974).

[79] United States v. Nixon, 418 U.S. 683, 688 (1974).

[80] *Id.* at 713–14.

[81] *See* Lesley Oelsner, *St. Clair Denies Knowing If Nixon Would Defy Court*, N.Y. TIMES (Jul. 10, 1974), https://www.nytimes.com/1974/07/10/archives/st-clair-denies-knowing-if-nixon-would-defy-court-lawyer-asserts.html.

[82] Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 499 (2018).

defender[s]" ultimately sided with the Court.[83]

In the litigation arising out of Watergate, the Courts had to go toe-to-toe with a President who did not respect the law. The President resigned. A peaceful transition of power took place. The courage of a lone district judge, and a steadfast commitment to the rule of law among members of the judiciary, steered our country through troubled waters.

C. Boumediene v. Bush

Yet another landmark in the tradition of judicial independence came in the 2008 case of *Boumediene v. Bush*.[84] *Boumediene* addressed the question of whether the writ of habeas corpus extended to individuals detained at the United States Naval Station at Guantanamo Bay on the island of Cuba.[85] Guantanamo Bay serves as a long-term detention center for foreigners whom the United States captured abroad and suspected of being "enemy combatants."[86]

In a series of earlier cases, the Supreme Court repeatedly had held that Guantanamo detainees were entitled to constitutional rights, including the right to a trial.[87] Congress responded unfavorably to this line of decisions, and attempted to strip the courts of jurisdiction to hear habeas petitions from detainees at Guantanamo Bay.[88] Justice Kennedy, writing for the Court in *Boumediene*, characterized Congress' reaction to the Court's prior cases as an "ongoing dialogue between and among the branches of Government," and acknowledged Congress's decision to "deprive[] the federal courts of jurisdiction to entertain the habeas corpus actions now before us."[89] So unlike in *Nixon*, the Court lacked the support of Congress; and unlike in *Brown*, the Court lacked the President's support. Standing alone, and looking to the Constitution, a majority of the Court held that the detainees at Guantanamo could petition for habeas corpus relief.[90]

That the Court reached this decision is itself extraordinary. Unlike earlier cases in which the Court was willing to defer to the Executive on an issue of national

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[83] *Id.* (quoting David S. Broder, *Rhodes Warns on Nixon Stand*, WASH. POST, June 11, 1974, at A6).

[84] Boumediene v. Bush, 553 U.S. 723 (2008).

[85] *Id.* at 732–33.

[86] *Id.* at 733–34.

[87] *See, e.g.*, Rasul v. Bush, 542 U.S. 466 (2004); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[88] Lumen N. Mulligan, *Did the Madisonian Compromise Survive Detention at Guantánamo?*, 85 N.Y.U. L. REV. 535, 573 (2010) ("Congress had clearly spoken: No federal court, Justice, or judge was to hear these cases.").

[89] *Boumediene*, 533 U.S. at 738–39.

[90] *Id.* at 765, 771 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

security—for example, during the Civil War and World War II—the Court reasserted itself as a defender of individual liberties. What's more, unlike *Brown* and *Nixon*, the Court's decision was not unanimous—instead, it was a close 5–4 decision with several vigorous dissents. Yet the President complied. Lower courts began to hear habeas petitions from Guantanamo detainees. Several detainees, including Boumediene himself, were eventually released.[91]

I'm not taking sides on whether *Boumediene* was rightly decided. That is not for me to say. But the takeaways from this discussion are clear: first, the Court rendered a significant ruling involving high-stakes concerns about national security and individual human rights; and second, the ruling was respected by the political branches. Compliance with a controversial ruling is always a victory for judicial independence and the rule of law.

D. The Present Day

I turn to the present day, and it is not one that is especially congenial to judges. I consider it no exaggeration when I say that judicial independence has been under attack in recent years. And it concerns me to see the nature and reach of those attacks. As I am sure you are aware, a man was arrested earlier this year for attempting to assassinate Justice Kavanaugh, apparently to remove his vote from the Supreme Court.[92] You may not be aware that Judge Reggie B. Walton of the District Court for the District of Columbia, who was assigned to preside over criminal prosecutions brought against some of those charged with involvement in the January 6th attack on the United States Capitol, has also received threats related to his work on those cases.[93] So have other judges on that court whom I know personally. Judge Walton, who is black, has also been the target of racial hatred by some who disagree with his decisions.[94] While I've been focusing on the Supreme Court—perhaps too much—the experience of Judge Walton reminds us that *all* judges are at risk these days. And not just federal judges.

We all know that we live in polarizing times. The legitimacy of judicial rulings depends, in large part, on how the broad public perceives us. And the perception of the Supreme Court seems to be, unfortunately, at an all-time low. A recent poll from Marquette University found that a majority of Americans disapprove of the

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[91] Scott Sayare, *After Guantánamo, Starting Anew, in Quiet Anger*, N.Y. TIMES (May 25, 2012), https://www.nytimes.com/2012/05/26/world/europe/lakhdar-boumediene-starts-anew-in-france-after-years-at-guantanamo.html.

[92] Ellie Silverman, Dan Morse, Katie Mettler & Devlin Barrett, *Man with Gun Is Arrested Near Brett Kavanaugh's Home, Officials Say*, WASH. POST, https://www.washingtonpost.com/dc-md-va/2022/06/08/kavanaugh-threat-arrest-justice/ (June 8, 2022, 7:34 PM).

[93] Hannah Albarazi, '*We Are Under Attack': Judge Warns of Threats to Judiciary*, LAW 360 (May 26, 2022, 4:49 PM), https://www.law360.com/articles/1497131.

[94] *Id.*

Supreme Court.[95] Another survey, conducted by the Pew Research Center, indicates that "current views of the court are among the least positive in surveys dating back nearly four decades."[96] That finding is confirmed by Gallup.[97] I have not been able to find high-quality polls that ask for views on lower federal courts, but I imagine their results rise and fall with the Supreme Court's. Sadly, only 16% of respondents believe that the Justices do an excellent or good job in keeping their political views out of their opinions.[98] For an institution that lacks sword and purse, and therefore must rely on public acceptance of its rulings, this trend is worrisome.

How did we get here? Public opinion polls often do not say *why* Americans disapprove of the Supreme Court's decisions. But the Pew survey contains a question that may reveal a source of this discontent. Eighty-four percent of Americans say that the Supreme Court Justices should not bring their own political views into the cases they decide.[99] I consider this an unfair characterization of the Court. I have great respect for each Supreme Court Justice, and do not doubt that their writings reflect good-faith attempts to say what the law is. Instead, I suspect that the public's view of a partisan judiciary results from increasingly harsh language used by political actors, some in media, and the ever-growing politicization of the nomination and confirmation process.

Many political actors often see an advantage in scapegoating the Supreme Court and judges in general. For example, Donald Trump made various negative comments about the courts, both while running for office and while in the White House. While running for President, then-candidate Trump declared that a district court judge presiding over a series of cases related to his Trump University could not be expected to be fair to him because the Indiana-born judge was a—quote—"Mexican."[100]

While in office, President Trump reacted to a decision striking down one of

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[95] Devan Cole, *New Poll: 54% of Americans Disapprove of Supreme Court Following Draft Opinion Leak*, CNN (May 25, 2022, 6:09 AM), https://www.cnn.com/2022/05/25/politics/supreme-court-approval-rating-drop-roe-leak/index.html.

[96] *Public's Views of Supreme Court Turned More Negative Before News of Breyer's Retirement*, PEW RSCH. CTR. (Feb. 2, 2022), https://www.pewresearch.org /politics/2022/02/02/publics-views-of-supreme-court-turned-more-negative-before-news-of-breyers-retirement/.

[97] *Supreme Court*, GALLUP, https://news.gallup.com/poll/4732/supreme-court.aspx (last visited May 2, 2023).

[98] *Public's Views of Supreme Court Turned More Negative Before News of Breyer's Retirement*, *supra* note 96.

[99] *Id.*

[100] Nina Totenberg, *Who is Judge Gonzalo Curiel, the Man Trump Attacked for His Mexican Ancestry?*, NPR (June 7, 2016, 7:20 PM), https://www.npr.org/2016/06/07/481140881/who-is-judge-gonzalo-curiel-the-man-trump-attacked-for-his-mexican-ancestry.

his immigration policies by declaring that the judge was an "Obama Judge."[101] In a "rare rebuke," Chief Justice Roberts responded:

> We do not have Obama judges or Trump judges, Bush judges or Clinton judges. . . . What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for.[102]

One district judge later told me that he "took that as Chief Justice Roberts telling us that he has our backs."

I hasten to add that the judiciary has been under attack not just from the likes of Donald Trump. In a speech on the steps of the Supreme Court in 2020, then-Senate Minority Leader Chuck Schumer "warned" Justices Gorsuch and Kavanaugh that they had—quote—"released the whirlwind, and you will pay the price. You won't know what hit you if you go forward with these awful decisions."[103] These threats once again prompted a rebuke from Chief Justice Roberts, who noted that "Justices know that criticism comes with the territory, but threatening statements of this sort from the highest levels of government are not only inappropriate, they are dangerous . . . All Members of the Court will continue to do their job, without fear or favor, from whatever quarter."[104] Indeed, Schumer later acknowledged that his language was both incendiary and inappropriate.[105] These statements are just several examples of a worrisome trend: politicians and commentators launching hyperbolic verbal attacks aimed at undermining the legitimacy of judicial decisions and of judicial independence itself.

Criticism of a court decision is one thing. It's free expression and can play a role in the development of the law. But the politicization of the nomination and confirmation process has become mean-spirited, often petty, and downright reckless. As Senator Mike Lee of Utah has noted, "[j]udicial nominations have become a blood sport."[106] I am not so naïve as to suggest that such considerations have always been absent from the nomination process. It is widely believed that Robert

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[101] William Cummings, *US Does Have 'Obama Judges': Trump Responds to Supreme Court Justice John Roberts' Rebuke*, USA TODAY (Nov. 21, 2018, 2:05 PM), https://www.usatoday.com/story/news/politics/2018/11/21/john-roberts-trump-statement/2080266002/.

[102] *Id.*

[103] Garrett Epps, *Chuck Schumer Needs to Watch Himself*, ATLANTIC (Mar. 6, 2020), https://www.theatlantic.com/ideas/archive/2020/03/chuck-schumer-supreme-court-comments/607588/.

[104] Andrew Desiderio, *Schumer Walks Back SCOTUS Comments After Roberts Rebuke*, POLITICO (Mar. 5, 2020, 1:03 PM), https://www.politico.com/news/2020/03/05/chuck-schumer-supreme-court-comments-121960.

[105] *Id.*

[106] *See, e.g.*, Ann E. Marimow, *Neomi Rao Pressed on Past Writings on Date Rape at Hearing on Her Judicial Nomination*, WASH. POST (Feb. 5, 2019, 3:16 PM), https://www.washingtonpost.com/local/legal-issues/neomi-rao-pressed-on-past-writings-on-date-rape-at-hearing-on-her-

Bork's candid answers during his confirmation hearing in 1987 lost him a seat on the Supreme Court.[107] And, as I mentioned previously, members of the political branches have sought since the Founding to fill the judiciary with their ideological allies.[108] But in recent years, political screening seems to have attained new heights. During the 2016 election, both major-party presidential candidates explicitly committed to jurisprudential litmus tests for prospective Supreme Court nominees. As President, Trump made good on his commitment by largely outsourcing his judicial nominations to the Federalist Society.[109] And during now-Justice Amy Coney Barrett's confirmation hearing for a seat on the Seventh Circuit Court of Appeals, one Democratic Senator questioned whether then-Professor Barrett's religious beliefs disqualified her for a judicial appointment.[110] This level of ideological screening threatens public expectations of what it means for the judiciary to be independent from the political branches. Such politicized nominations are also now commonplace—if less high profile—with court of appeals judgeships and even the occasional district court nominee.[111]

Perhaps as a result of the practice of partisan politics in judicial selection and confirmation, we are seeing a breakdown of norms that help to maintain judicial independence.[112] For example, while FDR's failed court-packing attempt may have clarified a norm against altering the Court's size as a means of altering its perceived political valence, political actors appear willing these days to manipulate the Court in this way. Indeed, the idea of "court-packing" is experiencing something of a revival. Senator Elizabeth Warren favors expanding the Supreme Court, arguing that the current Court's decisions "threaten[] the democratic foundations of our nation."[113] And this is not an opinion shared by only one senator. President Biden's Commission on the Supreme Court recently refused to take a clear stance on whether Congress should expand the size of the Supreme Court.[114]

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judicial-nomination/2019/02/05/156b4784-28b4-11e9-b2fc-721718903bfc_story.html.

[107] *Supreme Revenge: Battle for the Court* (PBS television broadcast Nov. 24, 2020).

[108] *See supra* notes 8–11 and accompanying text.

[109] *See* Lydia Wheeler, *Meet the Powerful Group Behind Trump's Judicial Nominations*, THE HILL (Nov. 16, 2017, 6:00 AM), https://thehill.com/regulation/court-battles/360598-meet-the-powerful-group-behind-trumps-judicial-nominations/.

[110] Guardian News, *"The Dogma Lives Loudly in You": Democratic Senator on Amy Coney Barrett*, YOUTUBE, at 0:48 (Sept. 26, 2020), https://www.youtube.com/watch?v=9mDQM1TzlAM.

[111] Geyh, *supra* note 48, at 1093–98.

[112] *Id.* at 1097.

[113] Elizabeth Warren, Opinion, *Expand the Supreme Court*, BOS. GLOBE, https://www.bostonglobe.com/2021/12/15/opinion/expand-supreme-court/ (Dec. 15, 2021, 10:00 AM).

[114] PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT 84 (Dec. 2021) ("As a Commission we have endeavored to articulate the contours of that debate . . . without

Let me be absolutely clear: this is not a "one party" problem. During the 2016 election, the late Senator John McCain suggested that the Senate would not approve any nominee put forth by Hillary Clinton if she were to be elected, which would have meant a de facto reduction in the size of the Court.[115] Nor is such manipulation relegated to the realm of hypotheticals. Also in 2016, the Republican-controlled Senate refused to act on President Obama's nomination of Merrick Garland, forcing the Court to operate with only eight members for over a year.[116] Diminution, as well as expansion, can compromise the Court's independence.

And court packing is not limited to the Supreme Court. In a 2017 memo to Congress, Professor Steven Calabresi—who at that time was a co-chairman of the Federalist Society—suggested that Congress should broadly expand the number of judgeships in the district courts and the courts of appeals. Though Calabresi and his co-author noted several non-partisan reasons for this expansion, they emphasized that one goal of their proposal was "Undoing President Barack Obama's Judicial Legacy."[117] These court-packing proposals tend to demonstrate to both politicians and the public that "court packing" is not actually a third rail of nomination politics.

If this hyper-partisan rhetoric regarding judicial decisions and nominations represents an indirect threat to judicial independence, the most recent Supreme Court term saw an entirely novel threat to that Court's decisional independence: the unprecedented leak of a draft Supreme Court decision.[118] The American judiciary has never been walled off from the public—commentators read tea leaves from oral argument while writing op-eds beseeching courts to act. And many forget, or are unaware, that the result in *Roe v. Wade*[119] itself was leaked to a reporter a few hours before the Court announced its decision in that case.[120] But the leak in *Dobbs v. Jackson Women's Health Organization*[121] was unique in both its thoroughness—an entire draft opinion leaked to a news organization—and its timing—the opinion

purporting to judge the weight of any of the arguments offered in favor or against calls to increase the size of the Court.").

[115] Geyh, *supra* note 48, at 1093–94.

[116] Ron Elving, *What Happened with Merrick Garland in 2016 and Why It Matters Now*, NPR (June 29, 2018, 5:00 AM), https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now.

[117] Ilya Somin, Opinion, *The Case Against Court-Packing*, WASH. POST (Nov. 27, 2017, 10:30 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/27/the-case-against-court-packing/.

[118] Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022, 2:14 PM), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473.

[119] Roe v. Wade, 410 U.S. 113 (1973).

[120] Rachel Treisman, *The Original* Roe v. Wade *Ruling Was Leaked, Too*, NPR, https://www.npr.org/2022/05/03/1096097236/roe-wade-original-ruling-leak (May 3, 2022, 11:53 AM).

[121] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

reportedly was leaked before any votes in the case were finalized.[122] In my 20-plus years as a member of the court of appeals—where we routinely circulate draft precedential opinions among chambers, not infrequently on controversial topics—I've not seen a single draft opinion leak.

We do not know who leaked the *Dobbs* draft, or why it was leaked. We don't even know if the leak occurred intentionally, although that is highly likely.[123] And if the leak was intentional, its timing and its thoroughness raise the prospect that the leaker hoped to influence the outcome of the case—whether that meant a liberal or moderate leaker hoping to foreshadow the backlash to *Dobbs*, or a conservative leaker hoping to lock in a wavering Justice.

Even if the leak was not intended to interfere with the Court's decisional process, interfere it did. While courts need not—indeed, in a free society, ought not—work under "cover of darkness," judges on collegial courts need to decide cases while receiving candid feedback from colleagues and without fear that public pressure may intrude into the decision-making process. After the *Dobbs* leak, individuals inside the Court reported an atmosphere rife with fear and distrust.[124] I worry about the Supreme Court's ability to function without relationships of trust and openness among Justices, and between Justices and their clerks.

There is another important point I need to emphasize. The judiciary has a responsibility to continue to demonstrate that it is worthy of independence. We, as judges, need not be reminded that our conduct—how we do our jobs and how we act in both public and private life—reflect how much we recognize and value the trust that has been placed in us. That means behaving in ways that are consistent with the Code of Conduct for United States judges.

Recently, the *Wall Street Journal* reported that some judges—a small but still unacceptable number—have heard cases involving parties in which they held a financial interest.[125] Most of those judges chalked these lapses up to negligence, not conscious wrongdoing.[126] But to maintain public faith in the judiciary, any appearance that a judge has ruled in a matter in which he or his family members have a personal or pecuniary stake is unacceptable.

By the same token, it should go without saying that judges must comport

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[122] Gerstein & Ward, *supra* note 118.

[123] *See, e.g.*, Press Release, Supreme Court of the United States, Statement of Chief Justice Roberts (May 3, 2022), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_05-03-22.

[124] Nina Totenberg, *After the Leak, the Supreme Court Seethes with Resentment and Fear Behind the Scenes*, NPR (June 8, 2022, 7:11 AM), https://www.npr.org/2022/06/08/1103476028/after-the-leak-the-supreme-court-seethes-with-resentment-and-fear-behind-the-sce.

[125] James V. Grimaldi, Coulter Jones & Joe Palazzolo, *Federal Judges Heard Cases Despite a Financial Interest*, WALL ST. J., Sept. 29, 2021, at A1.

[126] *Id.*

themselves appropriately in their personal conduct. In recent years, several judges have been credibly accused of acting inappropriately towards court staff and law clerks.[127] Those are egregious breaches of the Code of Conduct, and they undermine public faith in the judiciary no less than do matters that impact the resolution of cases.

Judges also need to be conscious of the language we choose and the tone we take, whether in speeches, in the courtroom, or in written opinions. Parties and counsel must always be treated with respect. And so must our judicial colleagues. Disagreements among judges—especially in the course of collegial decision-making—have always existed. It's *how* we express disagreement that matters. Our written work is in the public domain. Belligerence and bombast have no place in reasoned discourse and should be out of bounds. The use of harsh language by certain lower court judges has been widely documented and rightly criticized.[128] We in the Third Branch must not ourselves contribute to the general decline in civility in the public square.

The final point I make is to stress what ought to be obvious: why judicial independence is important. Of course, the cases that I have discussed demonstrate that robust judicial independence has protected minorities—fundamentally, in *Brown*—has kept the Executive within the bounds of the Rule of Law—most prominently in *Nixon*—and otherwise has protected democracy. But even at a more prosaic level, judicial independence also enhances the accuracy and quality of judicial decision-making.

As is well-known to every lawyer, sometimes "positive" law runs out.[129] According to Judge Harry T. Edwards—the former chief judge of the D.C. Circuit and a long-time appellate judge—about 5% to 15% of decisions are "very hard" decisions, meaning that the legal arguments leave a judge in equipoise.[130] In those cases, the law does not provide a single *correct* answer. But it still may provide a *best* answer, one resulting from the exercise of judicial discretion.[131] This is true on an

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[127] *See, e.g.*, Dan Berman & Laura Jarrett, *Judge Alex Kozinski, Accused of Sexual Misconduct, Resigns*, CNN, https://www.cnn.com/2017/12/18/politics/alex-kozinski-resigns (Dec. 18, 2017, 9:57 AM).

[128] *See, e.g.*, Ryan Boysen, *9th Circ. Judge Slams Colleagues Amid En Banc Denial*, LAW 360 (Aug. 18, 2021, 4:40 PM), https://www.law360.com/pulse/articles/1414148/9th-circ-judge-slams-colleagues-amid-en-banc-denial; Avalon Zoppo, *Dissents of Denial of En Banc Reviews Fuel Concerns Judges Are Airing Partisan 'Dirty Laundry,'* NAT'L L.J. (Sept. 1, 2021, 10:43 AM), https://www.law.com/nationallawjournal/2021/09/01/dissents-in-denial-of-en-banc-reviews-fuel-concerns-judges-are-airing-partisan-dirty-laundry/.

[129] Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1946 (2009).

[130] *Id.* at 1898.

[131] *Id.* at 1915.

appellate court, and it is true on a trial court. Decisions as varied as sentencing,[132] whether to admit or exclude evidence,[133] whether to grant an injunction,[134] and whether to sanction an attorney's conduct,[135] all require a judge to exercise her discretion.

A cynic might say that this is when a judge's personal or political biases take over. But I think those occasions are the exceptions, not the rule. The law is richly textured and contains deep principles as well as surface-level directives. Thus even when positive law runs out, judges can and must reach to other sources of legal authority, such as those familiar at common law.[136] This is the other side of the coin of judicial independence—decisional authority that is independent from one's own personal preferences.

It also explains two trends that I've witnessed among the courts of appeals. First, dissents are not the norm. In my experience, even in hard cases that remain unsettled after deliberation and discussion, the panel usually can agree on an approach to resolve the case unanimously. This occurs regardless of the nominal appointing parties or political preferences of the judges on the panel. Second, unanimity fosters collegiality. We can listen to each other, engage in discussion, and come out with a stronger opinion. That is because we are not politicians playing a zero-sum game. We are colleagues engaged in the same enterprise, trying to find the "best" answer when questions before us are unclear. I know that this view is widely shared in our judiciary.[137]

An independent judiciary allows judges to have these discussions and to exercise discretion to find the correct legal answer and uphold the rule of law. Just as judges must decide cases without regard to political outcomes or personal gain, it is no less crucial that judges be able to reach those decisions without fear of political consequence or personal harm. Those are the conditions in which we can apply the law fairly and without bias, and maintain "a government of laws, and not of men."[138]

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[132] Gall v. United States, 552 U.S. 38, 41 (2007).

[133] United States v. Mathis, 264 F.3d 321, 326–27 (3d Cir. 2001).

[134] NAACP v. N. Hudson Reg'l Fire & Rescue, 665 F.3d 464, 475 (3d Cir. 2011).

[135] Langer v. Monarch Life Ins. Co., 966 F.2d 786, 808 (3rd Cir. 1992).

[136] Edwards & Livermore, *supra* note 129, at 1946.

[137] *See generally* Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 UNIV. PA. L. REV. 1639 (2003).

[138] JOHN ADAMS, NOVANGLUS; OR, A HISTORY OF THE DISPUTE WITH AMERICA, FROM ITS ORIGIN, IN 1754, TO THE PRESENT TIME (1775), *reprinted in* THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 226 (C. Bradley Thompson ed., Liberty Fund 2000) (1775).