JUDICIAL INDEPENDENCE: A CALL FOR REFORM

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ABSTRACT

According to retired Justice Sandra Day O'Connor, judicial independence is threatened now more so than any other time throughout history. Attacks on the judiciary have crossed the line from legitimate criticism to partisan harangues that threaten the ability of judges to rule fairly and without bias. This Article begins with a historical look at judicial independence as it has shaped the Supreme Court, including the impeachment of Samuel Chase, Ex Parte McCardle *and the court-packing plan and concludes with a call for reform to the judicial appointment process to permit greater transparency in judicial selection.*

I. INTRODUCTION

The bruising war between political parties over judicial nominations has dominated newspapers, with headlines screaming of the use of the "nuclear option" in the Senate to eliminate judicial filibusters.[1] Arguably, the tenor of the conversation over judicial independence has worsened. While this tone is bad, review of the historical incidents of interbranch tension affecting the judiciary is instructive. This Article theorizes that the root cause of attacks on the judiciary is a lack of transparency in the appointment process. This lack of transparency transforms federal judicial appointment into an inherently political exercise. While federal judicial candidates are therefore placed in the impossible situation of being politically connected to receive their appointments, almost immediately after appointment, they are sworn to political independence.[2] This Article examines the three seminal historical events that posed the

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[1] *See* Carolyn Lochhead, *Showdown in Senate on Judicial Filibusters*, S.F. CHRON., May 18, 2005, at A1 (reporting on attempts by Senate Republicans, then a majority in the Senate, to change Senate rules to prohibit filibustering on judicial appointments, the so-called "nuclear option"). In the spring of 2005, political battles over U.S. judicial appointments captivated news headlines both at home and abroad. *See, e.g.*, Geoff Elliott, *Now or Never for Bush Judges*, AUSTRALIAN, May 16, 2005, at 12; Roger Mitton, *Parties on a Warpath Over US Judges Issue*, STRAITS TIMES (Singapore), May 17, 2005. Senator John McCain's role in a bipartisan group of Senators who blocked the rule change is cited "as one reason for lingering distrust of him among many conservatives." Carl Hulse, *Conservative Distrust of McCain Lingers Over '05 Deal on Judges*, N.Y. TIMES, Feb. 25, 2008, at A1.

[2] This Article's scope is limited to the federal judiciary. Similar problems exist at the state level, of course, and are compounded in the thirty-nine states where judges run for direct election. *See* Editorial, *The Best Judges Business Can Buy*, N.Y. TIMES, June 18, 2007, at A18 (pointing out judicial candidates for a state's highest court raised $47 million nationwide in 2004, mostly from business interests).

greatest threats to the judiciary (the Samuel Chase impeachment, *Ex Parte McCardle*,[3] and President Franklin Delano Roosevelt's court-packing plan) to demonstrate that each time, either the legislative or executive branches attacked the judiciary out of a sense of frustration that the judges were not being impartial or fair, and that this frustration can be eased if the process of appointment is more transparent. Finally, this Article suggests reforms, in line with the constitutional scheme, to satisfy the imperative for a fair, unbiased and impartial judiciary that enjoys a lasting reputation. Reforms in the United Kingdom culminating in the 2005 Constitutional Reform Act[4] can serve as a useful template on how to implement a transparent and independent judicial selection process. Specifically, the United States should examine a statutory duty upon all government officials to uphold and defend judicial independence, and the creation of an independent judicial appointment body to make transparent recommendations, based purely on merit, to the President for appointment.

II. THE POLITICAL PROCESS OF MAKING JUDGES

The oversized doors leading to the nation's Supreme Court are only visible when the building is closed to the public. The bronze doors, weighing thirteen tons and standing seventeen feet tall, hold "four low-relief panels whose theme illustrates significant events in the evolution of justice in the Western tradition."[5] The panel on the right door, just underneath the top panel, is titled "Coke and James I."[6] It depicts "England's Lord Chief Justice Coke bar[ring] King James I from the 'King's Court,' making the court, by law, independent of the executive branch of government."[7]

Coke wrote the original charter for Virginia in 1606[8] and authored *Dr. Bonham's Case*,[9] which many historians view as the origins of the doctrine of judicial review.[10] Although originally coined by medieval English jurist Henry Bracton, Coke is famously attributed to have said, "[t]he king himself should be under no man, but under God and under the law, wherefore the law makes the king. . . . There is no king where will dominates and not law."[11] In spite of the more than 400 years that have passed since Coke proposed a clear separation of the judiciary function from the executive function, the proper level of independence to be accorded to judges remains very much in the national conversation.

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[3] *Ex Parte* McCardle, 74 U.S. 506 (1868).

[4] Constitutional Reform Act, 2005, c.4, § 3(5) (Eng.), *available at* http://www.opsi.gov.uk/acts/acts2005/ukpga_20050004_en_3.

[5] OFFICE OF THE CURATOR, SUPREME COURT OF THE U.S., THE BRONZE DOORS: INFORMATION SHEET, http://www.supremecourtus.gov/about/bronzedoors.pdf (last visited Sept. 14, 2008).

[6] *Id.*

[7] *Id.*

[8] *Ex parte* Indian Ass'n of Alberta & Others, 78 I.L.R. 421, 425 (Eng. Ct. of App. 1982).

[9] Dr. Bonham's Case, (1610) 77 Eng. Rep. 638 (K.B.).

[10] ALFRED H. KNIGHT, THE LIFE OF THE LAW: THE PEOPLE AND CASES THAT HAVE SHAPED OUR SOCIETY, FROM KING ALFRED TO RODNEY KING 71-73 (1996).

[11] GEORGE HOLMES, THE LATER MIDDLE AGES, 1272-1485, at 80 (1966).

Judges, of course, are not above criticism. Lawmakers, academics, the press, and yes, sometimes even fellow judges,[12] routinely comment on and criticize judicial decisions. They are protected by a constitutional bar against any reduction in salary, serve for life, and are protected by judicial immunity.[13] These mechanisms are designed in the constitutional scheme to protect their independence while still allowing members of the public, as well as other branches of government, to criticize them. Drawing the line between criticism and attacks, that on balance harm the constitutional scheme, is never an easy task. It is made all the more difficult by the political environment, which in recent times has been shrill.

Take, for example, comments such as the one made by Texas Senator John Cornyn that judicial activism inflames the public and may lead to violence against judges, such as the murders of Judge Joan Lefkow's family members.[14] Fellow Texas Republican Tom DeLay's call for impeachment of judges following the debacle over the Terri Schiavo[15] case added flames to the fire, as did James Dobson's comparison of federal judges to the Ku Klux Klan,[16] and Pat Robertson's broad assertion that judges presented more of a danger to America than the Civil War, Nazis, or "bearded terrorists who fly into buildings."[17] The attacks have been so numerous and vitriolic that Justice Sandra Day O'Connor has made the issue a top priority in her retirement, observing that "I think we're hearing more criticisms about judges than I've heard in my very long lifetime."[18] Rather than retreat, both Senator DeLay and Senator Cornyn defended their actions, with Senator Cornyn calling Justice O'Connor's remarks "hyperbole," while Senator DeLay suggested Justice O'Connor was "rusty on the con-

[12] This last category of judges criticizing each other appears to be garnering more media attention recently. *See, e.g.*, Adam Liptak, *Unfettered Debate Takes Unflattering Turn in Michigan Supreme Court*, N.Y. TIMES, Jan. 19, 2007, at A21 (reporting on unflattering and embarrassing behavior by Justices on the Michigan Supreme Court); Tommy Witherspoon, *Disorder in the Court: Rancor, Dissension Plague Waco's 10th Court of Appeals*, WACO TRIB.-HERALD, June 10, 2007, at 1A, *available at* https://www.wacotrib.com/news/content/news/stories/2007/06/10/06102007wacjumbledjustice.html (observing that Chief Justice Tom Gray has used the terms "schizophrenic," "irrational," and "unlawful" in written dissents to describe his colleagues, and noting that the feuding judges may be motivated by Republican and Democratic politics). In one extraordinary instance, a federal judge even wrote an open letter to incoming Justice Clarence Thomas, expressing skepticism of Justice Thomas' upcoming tenure at the Court. *See* A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas From a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005 (1992).

[13] U.S. CONST, art. III, § 1.

[14] *See* John Aravosis, *Breaking: GOP Senator John Cornyn (R-TX) Says Violence Against Judges is Understandable*, AMERICABLOG.COM, Apr. 4, 2005, http://americablog.blogspot.com/2005/04/breaking-gop-senator-john-cornyn-r-tx.html.

[15] *See* Charles Babington, *Senator Links Violence to 'Political' Decisions*, WASH. POST, Apr. 5, 2005, at A7.

[16] *James Dobson Compared Supreme Court Justices to the KKK*, MEDIA MATTERS FOR AM., Apr. 11, 2005, http://mediamatters.org/items/200504110005.

[17] Dale Eisman, *"Out of Control" Federal Judges Endanger U.S., Robertson Says*, VIRGINIAN-PILOT, May 2, 2005, at A1.

[18] Jeff Carlton, *O'Connor Says She's Concerned About Attacks on Judges*, DALLAS MORNING NEWS, Apr. 5, 2007, *available at* http://www.dallasnews.com/sharedcontent/APStories/stories/D8OA4A300.html. *See also* Pat Milhizer, *Animosity Toward Courts 'Very Troubling,' O'Connor Says*, CHI. DAILY L. BULL., Apr. 11, 2007, at 1.

cept of checks and balances."[19] The attacks are often aimed at judges in general, but are sometimes narrowly targeted, such as attacks on Justice Anthony Kennedy,[20] for citing international norms in an opinion,[21] and to District Judge John Jones,[22] for ruling against teaching intelligent design in public schools.[23] Although largely a tactic used by conservatives to attack so-called activist judges, the political left is not unknown to attack judges, as witnessed recently in the condemnation[24] of a judicial decision to overturn the District of Columbia's gun ban.[25]

In addition to this "high-pitched rhetoric,"[26] attacks have also come in the form of proposed legislation against the judiciary. A well-publicized voter initiative, (it garnered 34,000 votes to appear on the November 2006 ballot), "JAIL for Judges,"[27] which would have stripped judges of judicial immunity, failed in South Dakota but only after a concerted effort by members of the bar to educate the public.[28] Similarly, congressional efforts to prohibit the Supreme Court from citing foreign law,[29] or to strip federal courts from hearing cases involving religious expression, have thus far failed.[30]

Far more successful, however, was legislation to introduce an Inspector General for the judiciary,[31] an effort that resulted in a massive campaign by the

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[19] Todd J. Gillman, *Texas Legislators Take Issue with O'Connor's Warnings*, DALLAS MORNING NEWS, Mar. 19, 2006, at 10A.

[20] Dana Milbank, *And the Verdict on Justice Kennedy is: Guilty*, WASH. POST, Apr. 9, 2005, at A3 (reporting on a conference held by the Judeo-Christian Council for Constitutional Restoration, at which noted conservative Phyllis Schlafly said Justice Kennedy had not met the Constitution's requirement for "good behavior" and called for his impeachment).

[21] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 578 (2005) ("The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.").

[22] *See* Phyllis Schlafly, *Judge's Unintelligent Rant Against Design*, EAGLE F., Jan. 6, 2006, http://www.eagleforum.org/column/2006/jan06/06-01-04.html (accusing Judge Jones "stuck the knife in the backs" of conservatives).

[23] Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707, 765 (M.D. Pa. 2005).

[24] *See* Jesse Jackson, *Activist Judge Takes Aim at Gun Law*, CHI. SUN-TIMES, Mar. 13, 2007, at 23.

[25] Parker v. District of Columbia, 478 F.3d 370, 401 (D.C. Cir. 2007), *aff'd*, District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

[26] *Judicial Security and Independence: Hearing Before the Comm. on the Judiciary*, 110th Cong. 3 (2007) (statement of Sen. Patrick Leahy, Chairman, S. Judiciary Comm).

[27] *See* Ron Branson, *Post-Election Report*, SD-JAIL4JUDGES.ORG, http://www.sd-jail4judges.org/ (last visited Sept. 10, 2008).

[28] Bert Brandenburg, *Rushmore to Judgment*, SLATE, Mar. 14, 2006, http://www.slate.com/id/2138057/.

[29] *See, e.g.*, H.R. Res. 468, 108th Cong. (2003). For Justice Ruth Bader Ginsburg's response to Congressional efforts to restrict the Supreme Court from citing foreign law, see Ruth Bader Ginsburg, *"A decent Respect to the Opinions of [Human]kind:" The Value of a Comparative Perspective in Constitutional Adjudication*, Feb. 7, 2006, http://www.supremecourtus.gov/publicinfo/speeches/sp_02-07b-06.html.

[30] *See, e.g.*, We the People Act, H.R. 300, 110th Cong. § 3 (2007). For an expanded discussion of these efforts, see Am. Bar Ass'n, Independence of the Judiciary: Court Stripping and Erosion of Judicial Discretion, http://www.abanet.org/poladv/priorities/erode/ (last visited Sept. 14, 2008).

[31] Judicial Transparency and Ethics Enhancement Act of 2006, H.R. 5219, 109th Cong. § 2 (2006); Judicial Transparency and Ethics Enhancement Act of 2007, H.R. 785, 110th Cong. § 2 (2007).

judiciary to scuttle the bill before it could be voted on.[32] In addition to legislation affecting the structure of the judiciary, highly politicized cases surrounding issues such as gay marriage, abortion, executive power and civil rights may be leading to a "new era of congressional sensitivity to court decisions that can be remedied with legislation."[33]

The upshot of this public spotlight on the judiciary is that presidential appointments to the bench are now examined with exacting scrutiny. A recent *Wall Street Journal* editorial, for example, proudly crowed that although President George Bush had confirmed fewer federal appellate judges than Presidents William Clinton or Ronald Reagan, he has paid "rigorous attention to judicial philosophy (no Souters here!)."[34] In discussing the upcoming presidential election, the editorial warns the Republican contenders that judicial nominations matter, and that "Mr. Bush set a high bar for what the base expects from its leaders; that alone is a legacy."[35] The political ideologies of President Bush's Supreme Court nominees were vetted by a committee led by Vice President Richard Cheney in an "unprecedented" examination.[36] Even Justice Antonin Scalia, a President Reagan appointee confirmed ninety-eight to zero by the Senate, freely admits that he "wouldn't get 60 votes today."[37] Once appointed, an inordinate amount of time and energy is expended to parse judicial opinions to divine whether a judge is conservative or liberal, activist or restrained, solid or drifting.[38]

The rhetoric has been fueled in large part by a perception that judges are results-oriented and seek results that comport generally with liberal or conservative positions.[39] That perception is validated by empirical research demonstrating fairly conclusively that "[t]o a substantial degree, the ideological tendencies of courts of appeals are correlated with the percentages of appointees by Republican and Democratic presidents."[40] A recent study of voting patterns of judges in the Sixth Circuit Court of Appeals revealed that those judges "consistently voted along partisan lines," even in cases involving habeas appeals and capital punishment.[41] Professor Anthony Champagne believes the

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[32] *House Bill Would Impose Inspector General on Judiciary*, THIRD BRANCH, July 2006, http://www.uscourts.gov/ttb/07-06/bill/index.html.

[33] Elana Schor, *Legislators Consider Fixes to Supreme Court Rulings*, HILL, June 27, 2007, http://thehill.com/leading-the-news/legislators-consider-fixes-to-supreme-court-rulings-2007-06-27.html.

[34] Kimberley A. Strassel, Op-Ed., *Judging the Bush Legacy*, WALL ST. J., Apr. 6, 2007, at A10.

[35] *Id.*

[36] Jo Becker & Barton Gellman, *Taking on the Supreme Court Case*, WASH. POST, June 26, 2007, at A10.

[37] Chris Tisch, *Scalia at Stetson Praises Original Intent View of Constitution*, ST. PETERSBURG TIMES, Apr. 5, 2007, at 4B.

[38] *See, e.g.*, Reynolds Holding, *The Drifters*, TIME, Apr. 16, 2007, at 57 (summarizing results of research studying ideological "drift" in federal judges over time).

[39] See Martha Neil, *Cases & Controversies: Some Decisions Are All the Rage – Literally*, 91 A.B.A. J. 38, 42 (2005).

[40] CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 129 (2006).

[41] Dan Horn, *The Politics of Life and Death: An Inmate's Fate Often Hinges on Luck of the Draw*, CINCINNATI ENQUIRER, Apr. 15, 2007, at A1 (reporting that "[a] panel with a liberal

attacks against judges increased substantially with the judiciary's interest in civil liberties questions during the Warren court era.[42]

The debate appears where a judiciary crosses the line from vigorously enforcing checks and balances on the other two branches of government to the lawless prairies of policymaking.[43] In this debate, "judicial activism" has become a universal pejorative.[44] Prominent conservative academics cry that the Supreme Court "sits in final judgment of essentially all policy issues, disregarding its constitutional limitations, the legitimate roles of Congress and the president, and the broad authority conferred upon the states and the people"[45] and that the Supreme Court operates as a quasi-legislature, and is poor at it.[46] This common refrain is heard in spite of empirical evidence indicating that Justice Scalia is the most "activist" Justice on the Supreme Court.[47]

Confirmation hearings take on a circus-like atmosphere, and when judges are nominated with prior executive branch experience, their work (sometimes decades old) as advocates become grist for the confirmation mill.[48] Professor Cass Sunstein points out that the claim that judges should interpret the law is both correct and "ludicrously unhelpful" since "interpreting the law" is itself subject to interpretation.[49] In reality, "[w]hat critics on both left and right really object to is the neutral application of constitutional principles when it hampers their own desired policy outcomes."[50]

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majority gives the inmate a far greater chance of avoiding execution than one with a conservative majority").

[42] *See* Anthony Champagne, *The Politics of Criticizing Judges*, 39 LOY. L.A. L. REV. 839, 841 (2006).

[43] For a vigorous discussion on this "line" for judicial activism, see Video and audio: Book Forum on DAVID'S HAMMER: THE CASE FOR AN ACTIVIST JUDICIARY held by The CATO Institute (Apr. 3, 2007), *available at* http://www.cato.org/event.php?eventid=3552 (forum featured Clint Bolick, M. Edward Whelan III & Jeffrey Rosen).

[44] *Id.*

[45] MARK R. LEVIN, MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA 12 (2005).

[46] *See* Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power,"* 80 B.U. L. REV. 967, 993-94 (2000).

[47] *See* Thomas J. Miles & Cass R. Sunstein, *Verdict on the Supremes*, L.A. TIMES, Oct. 22, 2007, at A21.

[48] *See, e.g.*, Joan Biskupic & Toni Locy, *Documents Offer Insight into Roberts' Work in '80s*, USA TODAY, Aug. 30, 2005, at 5A (reporting that Chief Justice Roberts wrote memos reminding the attorney general that Reagan's conservative supporters expected appointments of judges who respected "traditional family values and the sanctity of innocent human life"); Richard L. Hasen, *Roberts' Iffy Support for Voting Rights*, L.A. TIMES, Aug. 3, 2005, at B13 (discussing that Chief Justice Roberts urged Attorney General William French Smith to take an "aggressive stance" in opposing legislation to strengthen minority voting rights); Toni Locy & Kevin Johnson, *Roberts' Documents Disclose Little About Nominee*, USA TODAY, July 27, 2005, at 4A (reporting on scrutiny over Chief Justice Roberts' memos from his days as a special assistant to Attorney General William French Smith); David E. Rosenbaum, Robert Pear, Jonathan Glater & Glen Justice, *Files from 80's Lay Out Stances of Bush Nominee*, N.Y. TIMES, July 27, 2005, at A1 (reporting on many of Chief Justice Roberts's legal memoranda from his work as special assistant to Attorney General William French Smith).

[49] CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 23 (2005).

[50] Clint Bolick, *A Cheer for Judicial Activism*, WALL ST. J., Apr. 3, 2007, at A15.

The response to this latest round of attacks on the judiciary has been muted at best. Seventy-five percent of the deans of United States law schools signed a statement to members of Congress opposing threats of retaliation against federal judges for decisions made on the bench.[51] Several successful drives were launched to drive back much-hated legislation, but these were reactionary in nature. Justice O'Connor continues to press the topic as one of tremendous importance, launching an initiative through Georgetown Law to study the problem.[52] Congressional action has been limited to legislation to provide home security systems for judges who request them.[53] Real reform remains elusive.

Placed in historical context, however, contemporary attacks on the judiciary are neither particularly frequent nor notably vehement. Indeed, the history of the federal courts itself begins with attacks on the judiciary being launched while the ink on the Constitution was barely drying.[54] The institutional jealousies that lead to these attacks have much to teach us, for they contextualize what we are experiencing and point the way to meaningful and long-term reform rather than short term measures that doom us to repeat history's mistakes yet again. In the next section, this Article explores some of these seminal moments in judicial history and what some of those lessons may be.

III. THE CHASE IMPEACHMENT

By most accounts, Justice Samuel Chase was an able lawyer and judge, a good thinker and fiercely loyal to his friends.[55] However, he was also a "man of violent opinions, over-bearing manners, and fierce temper, he made enemies rapidly and easily, and he was always a center of controversy . . . ."[56] Historians note that history tends to overlook Justice Chase because of an "obsession with the superficial oddities of the man, his overbearing nature with lawyers and with juries, his apparently distasteful bombastic style, his unwillingness to suffer fools . . . ."[57] He was a Justice who "stubbornly pushed his judicial career to the brink of disaster and yet averted disgrace . . . ."[58]

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[51] Press Release, N. Y. Univ., Law Schools' Deans Challenge Congressional Attack on the Judiciary (May 10, 2005), *available at* http://www.nyu.edu/public.affairs/releases/detail/647.

[52] *See* Greg Langlois & Anne Cassidy, Georgetown Univ., *Fair and Independent Courts: A Conference on the State of the Judiciary*, http://www.law.georgetown.edu/news/events/conference_story.html (last visited Sept. 14, 2008).

[53] Jeff Coen, *Judges Get Home Security*, CHI. TRIB., June 25, 2006, at C1.

[54] *See, e.g.*, *infra* Section III.

[55] *See, e.g.*, R.W. Carrington, *The Impeachment Trial of Samuel Chase*, 9 VA. L. REV. 485, 485 (1923) (quoting Senator Beveridge, who described Chase as "intensely patriotic, courageous, able, learned, and of unquestionable integrity, both in his judicial and personal capacity").

[56] GEORGE L. HASKINS & HERBERT A. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL 1801–1815, at 91 (1981) (quoting WILLIAM H. REHNQUIST, THE SUPREME COURT 26 (Vintage Books 2002) (1987)).

[57] STEPHEN B. PRESSER, THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE 179 (1991).

[58] Jerry W. Knudson, *The Jeffersonian Assault on the Federalist Judiciary, 1802-1805*; *Political Forces and Press Reaction*, 14 AM. J. LEGAL HIST. 55, 62 (1970).

The impeachment of Justice Chase is often cited as an example of the first time a Supreme Court Justice was impeached and the last time a Justice was impeached solely for his judicial acts or decisions.[59] The story of Justice Chase's impeachment illustrates the nature of interbranch dynamics when the legislative branch takes aim at a judiciary seen as lawless and illegitimate, as was the case after the Jeffersonian revolution of 1800.

A. Impeachment

Under the Constitution, the President, Vice-President, and all "civil officers" of the United States may be impeached.[60] These individuals may be removed from office upon conviction for treason, bribery or other high crimes and misdemeanors.[61] Federal judges are provided with lifetime tenure "during good behavior,"[62] implying Congress may remove a judge for bad behavior. Impeachment of judges follows the same procedure as impeachment for other branches: the House of Representatives passes articles of impeachment by a simple majority[63] and the Senate tries the accused.[64] A vote of two-thirds of the Senators present is required to convict the defendant, which automatically results in the defendant's removal from office.[65] Presidential pardons are prohibited in impeachments[66] and the right to trial by jury does not extend to impeachments.[67] The House has initiated sixty-two impeachment proceedings since 1789, resulting in the impeachment of two Presidents (President Andrew Johnson and President Clinton, both acquitted), one cabinet officer (William Belknap, Secretary of War, resigned and later acquitted), one Senator (Senator William Blount, expelled, charges dismissed), one Supreme Court Justice (Justice Samuel Chase, acquitted), and twelve other federal judges (most recently Judge Walter Nixon, convicted on November 3, 1989).[68] All seven Senate convictions in impeachment proceedings have been federal judges.[69]

B. Early Life

Samuel Chase was born on April 17, 1741, in Princess Anne, Somerset County, Maryland.[70] His father was Rev. Thomas Chase, an Episcopalian pas-

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[59] *See* Federal Judicial Center, Judges of the United States Courts: Impeachments of Federal Judges, http://www.fjc.gov/history/home.nsf/page/topics_ji_bdy (last visited Sept. 14, 2008).
[60] U.S. CONST. art. II, § 4.
[61] *Id.*
[62] U.S. CONST. art. III, § 1.
[63] Am. Bar Ass'n, Impeachment Resources: A Look at the Impeachment Process, http://www.abanet.org/publiced/impeach2.html (last visited Sept. 29, 2008).
[64] U.S. CONST. art. I, § 3, cl. 6.
[65] *Id.*; U.S. CONST. art. II, § 4.
[66] U.S. CONST. art. II, § 2, cl. 1.
[67] U.S. CONST. art. III, § 2, cl. 3.
[68] U.S. Senate, Impeachment, http://www.senate.gov/artandhistory/history/common/briefing/Senate_Impeachment_Role.htm (last visited Sept. 3, 2008).
[69] *Id.*
[70] ColonialHall.com, Samuel Chase: 1743-1811, http://www.colonialhall.com/chase/chase.php (last visited Sept. 3, 2008) (citing CHARLES A. GOODRICH, LIVES OF THE SIGNERS TO THE DECLARATION OF INDEPENDENCE 338-46 (1856)).

tor.[71] His mother died during his birth, and his family was somewhat impoverished, which may explain Chase's "tendency easily to take offense and his predilection for speculative schemes as a result of a deep need to feel himself the equal of the members of the Maryland upper classes by whom he was slighted in his youth."[72] Some historians have suggested that the death of his mother explains his "lack of social graces and tact."[73] In 1743 the elder Chase was appointed to St. Paul's Church in Baltimore and moved the family there.[74] Rev. Chase taught Samuel at home, which at that time gave Samuel an advantage over his contemporaries, as the quality of public education was quite poor.[75] At age eighteen, he moved to Annapolis where he began studying law.[76] He was admitted to the bar at age twenty.[77] He began his political career in 1764 (age twenty-four), as a member of the General Assembly of Maryland and served there for twenty years.[78]

C. An Early Patriot

Chase was a member of the Continental Congress from 1774 to 1778, serving as a delegate from Maryland.[79] In the spring of 1776 he was part of a congressional mission to Canada to convince the Canadians to support the American Confederacy (ultimately, an unsuccessful mission).[80] When he returned to Philadelphia, Congress was debating issuing a declaration of independence.[81] Delegates from Maryland were prohibited by the appointing convention from voting in favor of a declaration of independence.[82] Chase returned to Maryland and convinced people there to send letters to the convention in Annapolis.[83] After the convention voted unanimously in favor for independence, Chase rode back to Philadelphia, covering 150 miles in two days, to join the vote for independence on the day of his arrival.[84] One biographer wrote that in Congress, Chase:

> [P]ossessed, beyond most others, an ardor of mind, which sometimes, in debate, carried him almost beyond the bounds of propriety. There were some others from time to time in congress of a similar stamp. They were important members; they served to

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[71] *Id.*

[72] Stephen B. Presser, Book Review, 68 J. AM. HIST. 657, 658 (1981) (reviewing JAMES HAW ET AL., STORMY PATRIOT: THE LIFE OF SAMUEL CHASE (1980)).

[73] *See, e.g.*, *id.*

[74] Samuel Chase: 1743-1811, *supra* note 70 (citing CHARLES A. GOODRICH, LIVES OF THE SIGNERS TO THE DECLARATION OF INDEPENDENCE 338-46 (1856)).

[75] *Id.*

[76] *Id.*

[77] Richard B. Lillich, *The Chase Impeachment*, 4 AM. J. LEGAL HIST. 49, 51 (1960).

[78] Biographical Directory of the United States Congress, Chase, Samuel, http://bioguide.congress.gov/scripts/biodisplay.pl?index=C000334 (last visited Sept.14, 2008).

[79] Samuel Chase: 1743-1811, *supra* note 70 (citing CHARLES A. GOODRICH, LIVES OF THE SIGNERS TO THE DECLARATION OF INDEPENDENCE 338-46 (1856)).

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

> animate that body by the warmth which they manifested in debate, and to rouse the more supine or timid to action, as the necessity of the times required.[85]

In 1778, Chase was forced to leave the Continental Congress "under a cloud after being denounced for using privileged information to speculate in the flour market."[86]

In 1783, forty-three year old Chase went to England to reclaim money Maryland had entrusted to the Bank of England.[87] He spent a year there, married his second wife, and brought her back to America.[88] Upon his return to America, he engaged in "various mercantile and land ventures, practiced and taught law, was a dominant figure in state politics, and emerged as one of the leading opponents of the adoption of the United States Constitution."[89] Historians believe his opposition to the Constitution stemmed from his fear that the Constitution "would destroy state sovereignty and, therefore, his own political status" in Maryland.[90]

Chase became judge of the Baltimore criminal court in 1788 (age forty-eight), and was appointed chief justice of the general court in Maryland in 1791.[91] The period between 1789 and 1793 is relatively undocumented in Chase's life, but it is marked by a clear conversion. In 1789, he was a "dispirited Antifederalist, ending a powerful legislative career and wondering how liberty could survive in a consolidated government susceptible to aristocratic influence."[92] By 1790, Chase had become a "stiff-necked Federalist, fearful of democracy and pessimistic about the future."[93] In 1793, he was "attacking the press as licentious" and "trembling for the future of religion and social order."[94] Some historians speculate that Chase was "driven by an outsider's hungry desire for acceptance in the inner circle of society, having inherited a gnawing ambition from his father."[95]

Like most Americans at the time, Chase was aghast at the French Revolution.

> The exaltation of atheism, the incitement of jealous violence by the lower orders against men of stature, the trampling of civil liberties, the assault on property rights, and the boldly proclaimed goal of ravaging all Europe, perhaps the whole Atlantic world, with similar savageries–this was what France meant to men like Chase.[96]

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[85] *Id.*

[86] Richard E. Ellis, Book Review, 48 J.S. HIST. 101, 102 (1982) (reviewing JAMES HAW ET AL., STORMY PATRIOT: THE LIFE OF SAMUEL CHASE (1980)).

[87] Samuel Chase: 1743-1811, *supra* note 70 (citing CHARLES A. GOODRICH, LIVES OF THE SIGNERS TO THE DECLARATION OF INDEPENDENCE 338-46 (1856)).

[88] *Id.*

[89] Ellis, *supra* note 86, at 101.

[90] *See* Marvin R. Cain, Book Review, 2 J. EARLY REPUBLIC 198, 199 (1982) (reviewing JAMES HAW ET AL., STORMY PATRIOT: THE LIFE OF SAMUEL CHASE (1980)).

[91] Samuel Chase: 1743-1811, *supra* note 70 (citing CHARLES A. GOODRICH, LIVES OF THE SIGNERS TO THE DECLARATION OF INDEPENDENCE 338-46 (1856)).

[92] James H. Broussard, Book Review, 40 WM. & MARY Q. 162, 162 (1983) (reviewing JAMES HAW ET AL., STORMY PATRIOT: THE LIFE OF SAMUEL CHASE (1980)).

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.* at 163.

He saw the Francophiles, affiliated with Jefferson, as deluded, intentionally "misleading voters with constant lies in the press" and threatening to end America's short experiment with independent democracy.[97]

D. Supreme Court Appointment

President George Washington nominated Chase as an Associate Justice of the Supreme Court of the United States on January 26, 1796[98] (the Supreme Court had only existed for six years at that time). He was confirmed a day later in the Senate.[99] Chase was fifty-five when he became a Supreme Court Justice.[100]

In those early years, the Supreme Court was very different than the institution that exists today. In 1791, only a year after the Court was organized, Justice John Rutledge, an original member, "resigned from the Court in order to become chief justice of his home state, South Carolina."[101] Four years later, Justice John Jay, the first Chief Justice, "resigned to become Governor of his home state, New York."[102] In 1800, when President John Adams asked Governor Jay to return to the Court, Governor Jay declined, observing that the Court lacked "energy, weight, and dignity."[103] "[D]uring the Supreme Court's first decade of operation (1790-1800), five of the first 12 men to serve on the Court resigned, while three other nominees" declined appointment or promotion to Chief Justice.[104]

From an early point in his career, Chase sought a federal judicial appointment from President Washington.[105] In 1788 he declared bankruptcy and the ghosts of his involvement in flour and land speculation led President Washington to avoid appointing him.[106] His recent opposition to the new Constitution may have also led President Washington to steer clear of Chase initially.[107] After Chase's appointment as chief judge of the Maryland general court in 1791 and James McHenry's 1795 report to the President that Chase had converted to Federalism, President Washington agreed to appoint Chase.[108] President Washington was also motivated by a very practical need to seat Chase. On January 28, 1796, President Washington urged Chase to hurry to Philadelphia because "'without him, there is no certainty of a sufficient number of Judges to constitute' the Supreme Court."[109]

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[97] *Id.*
[98] Knudson, *supra* note 58, at 63.
[99] *Id.*
[100] Lillich, *supra* note 77, at 53.
[101] Robert S. Barker, *I Do Solemnly Swear*, eJOURNAL USA: ISSUES OF DEMOCRACY, Apr. 2005, at 14, *available at* http://www.america.gov/media/pdf/ejs/0405.pdf#popup.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] W. Wayne Smith, Book Review, 48 J.S. HIST. 280, 281 (1982) (reviewing JANE SHAFFER ELSMERE, JUSTICE SAMUEL CHASE (1980)).
[106] *Id.*
[107] James R. Perry, *Supreme Court Appointments, 1789-1801: Criteria, Presidential Style, and the Press of Events*, 6 J. EARLY REPUBLIC 371, 394 (1986).
[108] *Id.* at 394-95.
[109] *Id.*

At that time, Justice Chase sincerely opposed "what he perceived to be the pro-French, atheistic, egalitarian Republicans."[110] This distrust of Republicans would eventually lead to his later impeachment. He served on the Supreme Court for five years before John Marshall became Chief Justice.[111] Justice Marshall wrote that Justice Chase "possessed a strong mind, great legal knowledge, and was a valuable judge."[112]

E. 1800

The political environment during this time was "partisan to a degree difficult to appreciate fully today . . . ."[113] When Federalist judges issued a decision, they were seen as creating a "conspiracy to deprive the people of power."[114] The Federalists saw the judiciary as the sole defender of democracy against mob rule.[115] In this environment, the Justices were "ambivalent members of an ambiguous institution."[116] Many of the Justices operated "freely" in politics and engaged in "far-ranging and free-sweeping commentary."[117] After Thomas Jefferson won the presidential election in 1800, a Federalist Senator said: "We are indeed, fallen on evil times. The high office of President is filled by an infidel, that of Vice-President by a murderer."[118] One Jeffersonian Senator remarked about Federalist judges:

> What think you, my friends, of our Supreme Judges electioneering at town and county meetings, those grave and solemn characters who ought to be retired from the public eye, who ought never to be seen in numerous assemblies or mingle in their passions and prejudices, and who, with respect to all political questions and characters, ought ever to be deaf and blind to everything except what they hear in evidence?[119]

The deeply partisan divide over the judiciary was reflected in the numbers: when President Jefferson took office on March 4, 1801, there was not one single Republican or Jeffersonian judge sitting in a federal court anywhere in the country.[120] To make matters worse, one of President Adams's "midnight appointment" judges (judges nominated after December 12, 1800, when it

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110 Cain, *supra* note 90, at 199.

111 Lillich, *supra* note 77, at 53.

112 *Id.*

113 Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 358 (1998). *See also* Carrington, *supra* note 55, at 498.

> It was a time of bitter party feeling. There were men like Giles of Virginia in the Republican ranks whose prejudices along party lines were far too bitter to allow him to judicially consider any Federal personage or doctrine. The Federal ranks contained equally as bitter partisans. John Adams had been arbitrary to a degree, and his 'mid-night' appointments, regardless of their wisdom, manifested a total lack of consideration and fairness on Adam's part to Jefferson.

Id.

114 Friedman, *supra* note 113, at 358.

115 *Id.*

116 Alan F. Westin, *Out-of-Court Commentary by United States Supreme Court Justices, 1790-1962: Of Free Speech and Judicial Lockjaw*, 62 COLUM. L. REV. 633, 637 (1962).

117 *Id.*

118 Carrington, *supra* note 55, at 498.

119 Westin, *supra* note 116, at 638.

120 Knudson, *supra* note 58, at 55.

became clear from electoral returns that President Adams lost the election) was John Marshall, a strong Federalist, now settling in for a long tenure at the Supreme Court.[121]

During this time, Supreme Court Justices were assigned to travel and hold court in the congressionally-created judicial circuits and would often charge grand juries with long speeches about the federal law.[122] Between 1798 and 1803, several Federalist judges began to use these grand jury charges as "hammer blows" for the Adams administration.[123] For example, in June 1799, "Chief Justice Oliver Ellsworth charged grand juries in South Carolina that those persons 'opposing the existence of the National Government or the efficient exercise of its legitimate powers' should . . . be indicted . . . ."[124] During the 1800 presidential campaign Justice Bushrod Washington stumped for candidate Charles C. Pinkney.[125] Judges also lectured grand juries on political questions such as "the Jay Treaty, French revolutionary plots against 'all religion . . . and order, . . . American 'Jacobins' (*i.e.,* 'anti-Federalists') in fomenting discontent, . . . [and] the great wisdom of the [Adams] administration . . . ."[126] President Jefferson remarked that the Justices were engaged in "'a perversion of the institution of the grand jury from a legal to a political engine.'"[127]

The battle over the judiciary played itself out early in the Jefferson administration with the repeal of the Judiciary Act of February 13, 1801.[128] The Act created sixteen new circuit courts and was characterized much later by Felix Frankfurter as "thoughtful concern for the federal judiciary with selfish concern for the Federalist party."[129] The Act addressed long-held concerns by circuit-riding judges about the primitive modes of transportation and the conflicts posed by a Justice being called to rule upon a case he decided while he was riding circuit.[130] The repeal of the Judiciary Act was not carried out easily, with struggles surrounding the constitutional issue of "whether Congress had the right to abolish as well as to create inferior courts, in view of the injunction that judges were not to be removed during 'good behavior.'"[131] Alexander Hamilton delivered a speech declaring that if the Republicans passed the repeal bill, "the [C]onstitution was but a shadow" and "[b]etween a government of laws administered by an independent judiciary, or a despotism supported by an army, there is no medium. If we relinquish one, we must submit to the other."[132] Newspapers quickly took sides in the debate, with the *National Intelligencer* commenting after the repeal: "Judges, created for political pur-

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121 *Id.*
122 Westin, *supra* note 116, at 640.
123 *Id.*
124 *Id.* at 640-41.
125 *Id.* at 637-38.
126 *Id.* at 641.
127 *Id.* (quoting 1 WARREN, THE SUPREME COURT IN THE UNITED STATES HISTORY 165 (rev. ed. 1947).
128 Knudson, *supra* note 58, at 55-56. *See also* Friedman, *supra* note 113, at 357.
129 Knudson, *supra* note 58, at 56.
130 *Id.*
131 *Id.* at 56-57.
132 *Id.* at 58 (quoting NAT'L INTELLIGENCER (Wash., D.C.), Feb. 19, 1802).

poses, and for the worst of purposes under a republican government, for the purpose of opposing the national will, from this day cease to exist."[133] President Jefferson himself stated:

> It has long been my opinion, and I have never shrunk from its expression, that the germ of dissolution of our Federal Government is in the constitution of the Federal judiciary. An irresponsible body, working like gravity by day and by night, gaining a little to-day and a little to-morrow, and advancing, with noiseless step like a thief, over the field of jurisdiction, until all shall be usurped from the state, and the government of all become consolidated into one.[134]

Senator James Breckinridge summed President Jefferson's viewpoint:

> It is said that the different departments of government are to be checks on each other, and that the courts are to check the [L]egislature. If this be true, I would ask where they got that power, and who checks the courts when they violate the Constitution? Would they not, by this doctrine, have the absolute direction of the government? To whom are they responsible?[135]

The Federalist-leaning *New England Palladium*, meanwhile, wrote that to repeal the Judiciary Act "breaks down almost the only barrier against licentiousness and party tyranny . . . ."[136] The Federalists believed the easy expression of people's passions to the legislature was dangerous.[137] They expressed this belief by advocating strictly for judicial independence.[138] Their position was not successful. The repeal measure passed by a vote of sixteen to fifteen in the Senate and fifty-nine to thirty-two in the House of Representatives.[139] The repeal measure also stipulated the Supreme Court would not meet at all during 1802, postponing the Court's opening until February 1803.[140] 1802 marked the last time Congress tinkered with the tenure of existing judges when altering the court system.[141]

The most famous of the judicial speeches came from Associate Justice Samuel Chase in 1803.[142] While charging a grand jury in Baltimore, Justice Chase excoriated the repeal of the Judiciary Act and spoke strongly against universal male suffrage in a new Maryland constitution.[143] On the repeal of the Judiciary Act, he said: "The late alteration of the Federal judiciary . . . will in my judgment take away all security for property and personal liberty."[144] He added: "The independence of the national judiciary is already shaken to its foundation, the virtue of the people alone can restore it. . . . Our republican Constitution will sink into a mobocracy, the worst of all possible govern-

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[133] *Id.* (quoting NAT'L INTELLIGENCER (Wash., D.C.), Mar. 5, 1802).
[134] Alexander Pope Humphrey, *The Impeachment of Samuel Chase*, 5 VA. L. REG. 281, 299 (1899).
[135] Friedman, *supra* note 113, at 363.
[136] Knudson, *supra* note 58, at 58 (quoting NAT'L INTELLIGENCER (Wash., D.C.), Feb. 12, 1802) (citation omitted).
[137] Friedman, *supra* note 113, at 360-61
[138] *Id.* at 361.
[139] Knudson, *supra* note 58, at 57.
[140] *Id.* at 61.
[141] *Id.* at 57.
[142] Westin, *supra* note 116, at 641.
[143] *Id.*
[144] Knudson, *supra* note 58, at 63 (quoting 2 HENRY ADAMS, HISTORY OF THE UNITED STATES OF AMERICA DURING THE FIRST ADMINISTRATION OF THOMAS JEFFERSON 243 (1889))

ments."[145] Justice Chase could not resist also attacking President Jefferson's administration as "weak, relaxed and not adequate to a discharge of their functions."[146] Republicans, Justice Chase said, wanted to continue exercising an "unfairly acquired power."[147] A newspaper, the *National Intelligencer*, condemned Justice Chase's speech as "the most extraordinary that the violence of federalism has yet produced, and exhibits humiliating evidence of the unfortunate effects of disappointed ambition."[148] Upon hearing of Justice Chase's speech, President Jefferson wrote to two leading House Republicans, Joseph Nicholson and John Randolph (later the House manager of Justice Chase's impeachment):

> Ought this seditious and official attack on the principles of our Constitution and on the proceedings of a State go unpunished; and to whom so pointedly as yourself will the public look for the necessary measures? I ask these questions for your consideration; for myself, it is better that I should not interfere.[149]

F. The Impeachment

The Republican view reflected a belief that impeachment was a "means of keeping the men on the bench in line with the will of the people by removing those judges whose opinions did not reflect those of more than one-third of the Senate."[150] Senator Giles, President Jefferson's fellow Virginian and a Republican Senate leader, held the view besides Justice Chase, all other Judges should be impeached and removed.[151] He felt there was no constitutional basis for judicial independence and Judges' "pretensions to [independence] were nothing more nor less than an attempt to establish an aristocratic despotism in themselves."[152] Some historians have suggested that President Jefferson was so irked by *Marbury v. Madison*[153] that he would have tried to impeach Chief Justice Marshall had the experiment with Justice Chase succeeded.[154] It was rumored that President Jefferson even had a replacement in mind as Chief Justice Marshall's successor, Judge Spencer Roane of Virginia.[155] At the state level, Federalist judges were already being impeached, including the 1802 impeachment of Judge Addison, the presiding judge of the Common Pleas

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[145] *Id.*

[146] Westin, *supra* note 116, at 641.

[147] *Id.* at 641-42.

[148] Knudson, *supra* note 58, at 67 (quoting NAT'L INTELLIGENCER (Wash., D.C.), Mar. 20, 1803).

[149] Lillich, *supra* note 77, at 51 (quoting 2 HENRY ADAMS, HISTORY OF THE UNITED STATES 50 (1889)).

[150] *Id.* at 55-56 (citing ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL III 159 (1916-19)).

[151] *Id.* at 56.

[152] *Id.*

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

[154] *See, e.g.*, Lillich, *supra* note 77, at 57 (quoting ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL III 160 (1916-19)). *See also* Carrington, *supra* note 55, at 498.

[155] Knudson, *supra* note 58, at 74.

Court of Pennsylvania.[156] After his conviction, the entire Supreme Bench of Pennsylvania was impeached, but later acquitted after support from the bar.[157]

Emboldened by their repeal of the Judiciary Act, Republicans had begun to "cast around for a likely Federalist judge" to attempt impeachment.[158] They began with Judge John Pickering, District Judge of New Hampshire, who according to informants regularly appeared on the bench drunk and engaged in profanity.[159] By a vote of forty-five to eight, the House impeached Judge Pickering on March 3, 1803.[160] That same year, Chief Justice Marshall handed down *Marbury v. Madison*,[161] a decision that is recognized today as the establishing the rule of law in courts.[162]

Judge Pickering's Senate trial began on March 2, 1804 and Judge Pickering failed to make an appearance.[163] His son Jacob, however, appeared and told the Senators his father had been insane for two years before the alleged offenses and was still insane.[164] The Republicans were in a quandary, because while they wanted to remove an insane judge, the fact of his insanity "precluded his being convicted of willful 'high crimes or misdemeanors.'"[165] The Senators were therefore asked to vote on whether Judge Pickering was "guilty 'as charged.'"[166] Of the thirty-four Senators, only twenty-six voted and convicted Judge Pickering on a vote of nineteen to seven.[167]

Exactly one hour after the conviction of Judge Pickering, the House, without debate, voted the impeachment of Justice Chase along party lines, seventy-three to thirty-two.[168] While Justice Chase was pending trial, Chief Justice Marshall privately proposed that Congress be granted authority to overrule judicial decisions on constitutional questions.[169] One of his biographers attributed this suggestion to Chief Justice Marshall's fear of Justice Chase's impeachment proceedings.[170] The party lineup in the Senate was twenty-five Republicans and nine Federalists.[171] If the vote went along party lines, the Republicans could obtain two-thirds majority required to convict.

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156 Humphrey, *supra* note 134, at 290.
157 *Id.* at 291.
158 Knudson, *supra* note 58, at 61.
159 *Id.*
160 *Id.*
161 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
162 For an extended and excellent discussion of *Marbury*, see Louise Weinberg, *Our* Marbury, 89 VA. L. REV. 1235 (2003). In the case, Chief Justice Marshall made it clear that

> [W]hether or not demagogues hold the political branches, and whether or not public opinion is mob opinion, the courts are open; that a tough, independent judiciary will guard its independence; that American courts will say what the Constitution requires of the legislature, of our officers, and of the judges as well.

Id. at 1411.
163 Knudson, *supra* note 58, at 61.
164 *Id.*
165 *Id.*
166 *Id.*
167 *Id.*
168 *Id.* at 62.
169 WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 126 (1992).
170 *Id.*
171 *Id.* at 108.

The articles of impeachment alleged that Justice Chase had been less than impartial when presiding at trials and when supervising grand jury investigations in a series of cases against political opponents of the Adams administration.[172] They also alleged that in 1803 he had delivered an "intemperate and inflammatory political harangue" to a grand jury in Maryland against the state government.[173] The three most important charges concerned Justice Chase's handling of the treason trial of John Fries, the sedition trial of James Callender, and his 1803 speech in Baltimore.[174] Another article, the fifth, charged Justice Chase with "[m]isconduct at the [Callender] trial in issuing a bench warrant instead of a summons."[175] This article made "mere error of judgment impeachable."[176] Since the article "could have been applied to the entire Supreme Court, conviction of Justice Chase on this count would have put the court at the mercy of Congress."[177] In his book, former Chief Justice William Rehnquist believed that the case against Justice Chase was "not devoid of substance."[178] In particular, the trial of James Callender raised serious questions.[179]

James Callender was no stranger to controversy. In 1793, he was indicted in Britain "for seditious criticism of the government [and] fled to the United States."[180] He became a "pronounced partisan" for the Republicans and attacked the Federalists in pamphlets and in newspaper pages.[181] "To avoid the Alien Law, he . . . naturalized [as a U.S.] citizen."[182] Callender wrote an election pamphlet, *The Prospect Before Us*,[183] in Virginia in 1800, campaigning for Jefferson.[184] Some of what Callender wrote is worth excerpting:

> The reign of Mr. Adams has been one continued tempest of malignant passions. As President, he has never opened his lips, or lifted his pen without threatening and scolding . . . . The object of Mr. Adams was to recommend a French war, professedly for the sake of supporting American commerce, but in reality for the sake of yoking us into an alliance with the British tyrant.
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> . . . Adams [is] a "hoary headed incendiary" . . . "You will then make your choice between paradise and perdition; you will choose between the man who has deserted and reversed all his principles, and that man whose own example strengthens all his laws, that man whose predictions, like those of Henry, have been converted into history. You will choose between that man whose life is unspotted by crime, and that man whose hands are reeking with the blood of the poor, friendless Connecticut sailor: I see the tear of indignation starting on your cheeks! You antici-

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172 13 ANNALS OF CONG. 1237-40 (1804).
173 *Id.* at 1239.
174 Knudson, *supra* note 58, at 63. *See also* Carrington, *supra* note 55, at 487 (noting that "there were really only three charges of importance").
175 Lillich, *supra* note 77, at 59.
176 *Id.* at 60.
177 *Id.*
178 REHNQUIST, *supra* note 169, at 108.
179 James Haw, Book Review, 37 AM. J. LEGAL HIST. 402, 403 (1993) (reviewing REHNQUIST, *supra* note 169).
180 James Morton Smith, *Sedition in the Old Dominion: James T. Callender and the Prospect Before Us*, 20 J.S. HIST. 157, 158 (1954).
181 *Id.* at 158-59.
182 *Id.* at 159 (citing Letter from Thomas Jefferson to James Madison (June 7, 1798), *reprinted in* 8 THE WRITINGS OF THOMAS JEFFERSON 267 (Paul L. Ford, ed. 1892-99)
183 JAMES THOMSON CALLENDER, THE PROSPECT BEFORE US (1800).
184 Smith, *supra* note 180, at 161 & n.18, 162.

pate the name of John Adams." "Take your choice then, between Adams, war and beggary, and Jefferson, peace and competency."[185]

On the judiciary, Callender wrote: "If Washington wanted to corrupt the American judges, he could not have taken a more decisive step than by the appointment of [Chief Justice] Jay."[186] Callender's work gained in popularity and was soon being distributed throughout the country, including Philadelphia.[187] The Federalists tried to ban the sale of his pamphlet there, to which Callender replied: "If the author has afforded room for *an action,* do prosecute him. But do not take such pitiful *behind the door* measures in order to stop the circulation of truth."[188]

Justice Chase was quick to accept Callender's invitation. By the time he was already on the Supreme Court, Justice Chase felt that "a licentious press is the bane of freedom, and the peril of Society."[189] After reading *The Prospect Before Us*,[190] Justice Chase reportedly remarked it was a pity that Callender had not been hanged in a prior vagrancy case.[191] At Justice Chase's impeachment trial, one prosecution witness testified that "if the Commonwealth of Virginia was not utterly depraved, or that if a jury of honest men could be found there, [Chase] would punish Callender."[192] On May 23, 1800, Justice Chase convened a grand jury and charged them with investigating Callender's violations of the Sedition Law.[193] The grand jury agreed and the District Attorney indicted, quoting twenty passages from *The Prospect Before Us*.[194] "Callender was charged with maliciously designing to defame President Adams by writing and publishing the words with intent to bring him into contempt and to excite the hatred of the good people of the United States toward him."[195] A second count charged Callender with "causing or procuring these false, scandalous, and malicious statements to be printed and published."[196] Virginia, which had twice condemned the Sedition Law as unconstitutional in its own legislature, provided funding for Callender's defense.[197] During pre-trial arguments, Justice Chase "bluntly branded Callender's [pamphlet] as false; the defendant's bad intentions seemed 'sufficiently obvious' to the judge."[198] While seating the jury, Justice Chase allegedly instructed the Federal Marshal to strike from

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[185] *Id.* at 161-62 (emphasis and brackets omitted) (quoting U.S. v. Callender, *in* STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 688-90 (Francis Wharton ed., 1849)).
[186] Humphrey, *supra* note 134, at 287 (quoting CALLENDER, *supra* note 183).
[187] Smith, *supra* note 180, at 163.
[188] *Id.* at 164 (quoting RICHMOND EXAMINER, May 9, 1800).
[189] *Id.* at 164-65 (quoting Chase to James McHenry, Dec. 4, 1798, *in* THE LIFE AND CORRESPONDENCE OF JAMES MCHENRY, SECRETARY OF WAR UNDER WASHINGTON AND ADAMS 203 (Bernard C. Steiner ed., 1907)).
[190] CALLENDER, *supra* note 183.
[191] Smith, *supra* note 180, at 165 (quoting James Triplett).
[192] Carrington, *supra* note 55, at 488 (quoting John Thompson Mason). *See also* Humphrey, *supra* note 134, at 287-88.
[193] Smith, *supra* note 180, at 166.
[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] *Id.* at 168.
[198] *Id.* at 171.

the jury panel "any of those creatures or people called democrats."[199] When "the [M]arshal replied that he . . . made no discrimination, . . . Judge Chase told him to look over the panel and if there were any of that description to strike them off."[200] "[T]he jury . . . consisted exclusively of Federalists."[201]

The conduct of the "case is best remembered not for the government's plea but for Judge Chase's rulings against the defense."[202] He refused to permit the defense attorneys to argue the constitutionality of the Sedition Law to the jury, as was custom at the time.[203] Callender's lawyers were so frustrated that successive defense counsel withdrew from the case, leaving Callender undefended.[204] There is some credible evidence, however, that Callender's lawyers were more interested in advancing their own careers and "scoring . . . points against the Adams administration than" with providing Callender a defense.[205] Later, at Justice Chase's impeachment trial, witnesses testified that Justice Chase's comments to Callender's lawyers "were 'in a high degree imperious, satyrical and witty,' and that 'the audience enjoyed considerable mirth at the expense of the counsel.' "[206] The jury convicted after two hours of deliberation and Justice Chase declared that the verdict was "pleasing to him, because it shewed that the laws of the United States could be enforced in Virginia . . . ."[207] Justice Chase said that until he had read Callender's writings, "he had not thought there was so bad a man in the United States."[208] He was "'extremely happy . . . that Callender was not a native American.' "[209] Justice Chase "sentenced Callender to nine months in jail," fined him $200, "and bound him over on a $1,200 bond" for two years of good behavior.[210] Callender stayed in prison until the day the Sedition Law expired, March 3, 1801.[211]

In addition to the Callender case, Judge Chase was impeached for this handling of the treason case of John Fries.[212] Fries was part of a 1799 armed uprising protesting new federal internal revenue laws involving taxes on houses

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[199] *Id.* (quoting CHARLES EVANS, REPORT OF THE TRIAL OF THE HONORABLE SAMUEL CHASE 43-44 (1805) [hereinafter CHASE TRIAL]). *But see* Stephen B. Presser & Becky Bair Hurley, *Saving God's Republic: The Jurisprudence of Samuel Chase*, 1984 U. ILL. L. REV. 771, 809 (1984) (stating "there is no credible evidence" to support this charge).

[200] Carrington, *supra* note 55, at 489 (quoting John Heath).

[201] Smith, *supra* note 180, at 171.

[202] *Id.* at 176.

[203] *Id.* at 177. *See also* Carrington, *supra* note 55, at 487-88 ("[T]he impression that a lawyer had the right to argue not only facts but also the law of a criminal case to a jury, and even to persuade them to disregard the opinion and instructions of the court, was very strong at that time."); Humphrey, *supra* note 134, at 286.

[204] Smith, *supra* note 180, at 177-78.

[205] *See* Presser & Hurley, *supra* note 199, at 810.

[206] Carrington, *supra* note 55, at 488 (quoting John Taylor).

[207] Smith, *supra* note 180, at 178 (quoting RICHMOND EXAMINER, June 6, 1800).

[208] *Id.* at 179.

[209] *Id.* (quoting Robertson's Transcript *in* CHASE TRIAL, *supra* note 199, at 94).

[210] *Id.* at 180.

[211] *Id.* at 180 & n.84.

[212] Carrington, *supra* note 55, at 487. For an extensive description of the Fries trial and discussion on Chase's motivation during the trial, see Presser & Hurley, *supra* note 199, at 802-08.

and land.[213] The revenue law was passed "to meet expenses of [putting down] the [1794 Whiskey Rebellion]."[214] Fries' role in the uprising was not insignificant–he "led an armed assault to free federal prisoners arrested for resisting the collection of the tax."[215] Fries was described by one historian as a "sort of traveling fakir, of ready tongue and turbulent disposition . . . ."[216] Fries was initially tried before Judges Iredell and Peters, convicted, and sentenced to death.[217] He was "granted a new trial when one juror was found to [be biased],"[218] which was heard before Judge Chase and Judge Peters, a district judge.[219] Judge Chase was convinced Fries' first trial took too long and he "was determined that his Circuit court would demonstrate the certainty and efficiency of federal justice."[220] "On the day of the trial Judge Chase handed . . . the clerk a written opinion stating that he had carefully considered the law, and had written . . . his opinion," with multiple copies for the District Attorney, defense counsel and the jury.[221] Fries' counsel refused to proceed with the case and Fries was convicted and sentenced to death.[222] President Adams had such misgivings about the case that he later pardoned Fries.[223] The impeachment complaint against Justice Chase centered on his "form[ing] and render[ing] an opinion [about] the law without allowing counsel to argue . . . ."[224]

"The impeachment trial [in the Senate] opened on January 3, 1805."[225] "As the day of the trial approached, hundreds of people [gathered in] Washington."[226] Vice-President Aaron Burr, "under two state indictments for the murder of Alexander Hamilton" during a duel in the preceding summer, presided over the trial.[227] On February 4, Justice Chase answered the charges against him by "explain[ing] his conduct on the first seven [charges] and deny[ing] the eighth charge [completely]."[228] In assessing the prosecution's performance during the impeachment trial, historians have not been kind. One writes: "[T]he affair was bungled from start to finish, and the incident mangled the political reputations of all those intimately connected with it."[229] Another comments: "When confronted with such lawyers as defended Chase [Ran-

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213 Humphrey, *supra* note 134, at 285.
214 Presser & Hurley, *supra* note 199, at 802.
215 *Id.*
216 Humphrey, *supra* note 134, at 285.
217 *Id.*
218 Presser & Hurley, *supra* note 199, at 803.
219 Humphrey, *supra* note 134, at 285.
220 Presser & Hurley, *supra* note 199, at 803.
221 Carrington, *supra* note 55, at 487 (emphasis omitted).
222 *Id.*
223 Humphrey, *supra* note 134, at 285.
224 Carrington, *supra* note 55, at 487.
225 Knudson, *supra* note 58, at 65.
226 Lillich, *supra* note 77, at 62.
227 Knudson, *supra* note 58, at 65.
228 *Id.* at 66.
229 *Id.* at 60. *See also* Lillich, *supra* note 77, at 57, 63 (commenting that "[t]he House managers [were] good politicians but poor lawyers" and Randolph "was totally inadequate to conduct a major state trial").

dolph] found it utterly impossible to make head against the current of legal reasoning and authority adduced by them."[230]

The prosecution began its case on February 9, and over the next four days called eighteen witnesses, of which six were cross-examined by the defense.[231] The defense opened on February 15, calling "thirty-one witnesses in four days."[232] On February 20, eight days of closing arguments began.[233] One memorable moment in the prosecution's case came during Randolph's closing argument, when he argued that juries had the right to determine the meaning of the law. He said:

> Suppose a man should be indicted for killing another. Some circumstances will amount to a justification, such as being in defence of his person, and, which I consider equally as sacred, in defence of his character and reputation. If I were on the jury, and it appeared that the person indicted had killed the other in defence of his character and reputation, I will not find him guilty of murder, though directed by all the courts of the nation.[234]

The thinly veiled reference to Vice-President Burr's legal problems was called a "palpable 'gallery shot.'"[235]

Joseph Hopkinson, a thirty-four year old lawyer, opened for the defense.[236] He said: "We appear for an ancient and infirm man, whose better days have been worn out in the service of that country which now degrades him, and who has nothing to promise you for an honorable acquittal but the approbation of your own consciences."[237] On the matter of Justice Chase's refusal to permit Callender's lawyers to argue the constitutionality of the Sedition Law to the jury, there appears to have been a "real difference of opinion" on whether this was a role for the jury or the judge.[238] Another lawyer for Justice Chase was Luther Martin,

> [P]robably the greatest trial lawyer in the United States, known as the 'Federalist bulldog.' A man who enjoys the distinction of having been supported in his last days by the levy of a special license tax by the State of Maryland of five dollars upon every lawyer at the bar.[239]

Martin reputedly "knew more law drunk than the managers did sober."[240] Martin, in addressing the point to the Senate, said:

> I, Sir, have always considered it the province of the Court in the course of a trial, in all cases, whether civil or criminal, to declare what is the law. . . . When a case comes before a jury, the Court informs them what is the law if they believe the facts given in evidence; if they do believe the facts, they are bound in duty to decide according to the law explained to them by the Courts.[241]

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[230] Humphrey, *supra* note 134, at 289.
[231] Knudson, *supra* note 58, at 66.
[232] *Id.*
[233] *Id.*
[234] Humphrey, *supra* note 134, at 286-87.
[235] *Id.* at 286.
[236] Carrington, *supra* note 55, at 493.
[237] *Id.* (quoting Joseph Hopkinson).
[238] *Id.* at 495.
[239] *Id.*
[240] Lillich, *supra* note 77, at 63.
[241] Carrington, *supra* note 55, at 495.

As a matter of fact, some historians have characterized Justice Chase as the source for "the doctrine that the national judiciary had the exclusive tasks of determining the constitutionality of Congressional legislation, and invalidating any acts which failed to conform with that national charter."[242] One of the petit jurors in the Callender trial, testifying in Justice Chase's defense, characterized the trial as follows:

> It appeared to me that the defense which the counsel for Callender attempted to make, was the constitutionality of the law, and that they had no hopes of saving him except on this ground; and that when the judge determined that the law was constitutional. and [sic] that they should not address their arguments to the jury on that point, they became extremely mortified.[243]

In making their arguments, Justice Chase's lawyers repeatedly made the point that in order for a Judge to be removed, the Judge must have committed an indictable offense.[244] Joseph Hopkinson remarked:

> Does such a court [United States Senate] act to scan and to punish petty errors and indiscretions too insignificant to have a name in the penal code, too paltry for the notice of a court of quarter sessions? Is the Senate of the United States . . . to fix a standard of politeness in a judge, and mark the precincts of judicial decorum?[245]

If Judges could be removed for conduct less than that which is indictable, they argued, the Constitution's prohibition against removal of Judges during "good behavior" would be violated.[246] Robert Harper, in closing for the defense, urged the Senators to not allow "their decisions to be swayed or influenced by any party [affiliations]."[247] In rebuttal for the prosecution, Randolph stated:

> We demand not that an independent judge shall be removed from office. There are independent judges on the bench, whose dismissal we do not seek. We only ask that a man, who is unworthy of the high judicial station which he fills, should be dismissed from the service of his country at the age of seventy years. A man who has marked his whole character with oppression, and been constantly employed in preaching politics and construing treason.[248]

Of the witnesses called by the defense, perhaps the most interesting was Chief Justice Marshall. One historian writes:

> It is evident that he did not regard his colleague as a model judge, and, while unwilling to publicly condemn him, was in no way pleased that his turbulent disposition and factional temper had involved the court in an ugly dispute at a time when the utmost caution was necessary to its firm establishment.[249]

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[242] Presser & Hurley, *supra* note 199, at 772. The authors argue that Marshall, who sat in the audience during the Callender trial, "absorbed" Chase's lessons for future use. *Id.* They also argue that "[w]hat Chase did in *Callender* required much more political courage" than what Marshall did in *Marbury v. Madison*, "because Chase was performing before a hostile audience in Virginia." *Id.*

[243] Carrington, *supra* note 55, at 489.

[244] Lillich, *supra* note 77, at 57.

[245] Carrington, *supra* note 55, at 494 (quoting Joseph Hopkinson).

[246] Knudson, *supra* note 58, at 65.

[247] Carrington, *supra* note 55, at 497.

[248] Knudson, *supra* note 58, at 66-67 (quoting John Randolph).

[249] Humphrey, *supra* note 134, at 282.

Another argument made strongly by Justice Chase's lawyers surrounded Justice Chase's rights as a citizen, even after his appointment to the Supreme Court. Harper, arguing the point, said: "Is it not lawful for an aged patriot of the revolution to warn his fellow-citizens of dangers, by which he supposes their liberties and happiness to be threatened? Or will it be contended that a citizen is deprived of these rights, because he is a judge?"[250] Harper also argued the Constitution contained no express prohibition against Judges from engaging in political speech to a jury.[251]

Upon polling the Senators on each of the eight articles of impeachment, nineteen votes (short of the twenty-three needed for conviction) "were the most the Republicans could muster" on the eighth article concerning Justice Chase's speech in Baltimore.[252] Not one Senator voted to convict on the fifth article, alleging an error in judgment.[253] Six Republican Senators deserted the party completely, "voting 'not guilty' on all eight articles."[254] Randolph left the Senate Chamber and went straight to the House, where he introduced a resolution for a constitutional amendment to provide for removal of federal judges by the President upon joint address of both Houses of Congress.[255] On March 1, 1805, Vice President Burr presiding as President of the Senate, announced Justice Chase had been acquitted.[256]

Justice Chase "resumed his seat on the bench and retained it until his death in Washington, D.C., on June 19, 1811 . . ."[257] "In the judgment of Henry Adams, 'The failure of Chase's impeachment was a blow to the Republican party from which it never wholly recovered.' "[258] While the judiciary was considered "the weakest of the three branches of government, . . . under the Jeffersonian attack it proved to be the toughest."[259] Several years later, President Jefferson "bemoan[ed] that impeachment was a 'mere scarecrow.' "[260] Following Justice Pickering's removal and Justice Chase's acquittal, Congress did not attempt impeachment of a federal judge again until 1831, when Judge James Peck was impeached (he was acquitted in the Senate), and then many years followed before Charles Swayne was impeached in 1904.[261]

Historians typically point to the Chase impeachment as an important milestone in establishing the independence of the judiciary and establishing the precedent that judges should not be removed merely for political speech from the bench.[262] If Justice Chase had been convicted, the conviction

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[250] Westin, *supra* note 116, at 643.
[251] *Id.*
[252] Knudson, *supra* note 58, at 67.
[253] *Id.*
[254] *Id.*
[255] *Id.*
[256] U.S. SENATE JOURNAL, 8th Cong., 2d Sess. (Mar. 1, 1805).
[257] Biographical Directory of the United States Congress, Chase, Samuel, *supra* note 78.
[258] Knudson, *supra* note 58, at 55.
[259] *Id.*
[260] Lillich, *supra* note 77, at 70.
[261] *See* Federal Judicial Center, Judges of the United States Courts: Impeachments of Federal Judges, *supra* note 59.
[262] *See, e.g.*, Stephen B. Presser, *Chase, Samuel*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 161 (Kermit Hall, James W. Ely, Jr. & Joel B. Grossman eds., 2d ed. 2005). *See also* Carrington, *supra* note 55, at 499 ("A conviction of

> would . . . have established the proposition[ ] . . . that a judge could be addressed out of office whenever his political opponents could command the necessary majority to that end. This would have destroyed the Supreme Court, or have so weakened its character as to make its influence of small moment in the formative period of this republic."[263]

While that characterization is probably true, the impeachment nevertheless sent a strong signal to judges that engaging in openly partisan political activity was dangerous.[264] Indeed, in the wake of the impeachment, historians point to three results. First, the manners of federal judges *improved remarkably*.[265] Second, "federal judges refrained from active participation in politics."[266] Finally, threats of impeachment of federal judges for their political opinions have largely disappeared from mainstream discourse.[267]

IV. *EX PARTE MCCARDLE*

After the Chase impeachment proved the futility of impeachment as a legislative tool to check the judiciary, attention in Congress turned to the use of jurisdiction as a means of controlling the courts. Attempts to strip the Court of its jurisdiction to hear cases are nothing new in American legal history. After *Martin v. Hunter's Lessee*,[268] for example, when the Court affirmed its authority to invalidate unconstitutional state laws, states' rights advocates attempted to strip the Court of its jurisdiction to review state laws altogether.[269] In the 1950's, Congress considered legislation to "remove certain internal security laws from the possibility of Supreme Court invalidation."[270] In the 1960's, proposals to preclude judicial review of obscenity laws were considered.[271] In the 1980's, there were a number of proposals that would have stripped courts of the power to hear cases on abortion[272] and school prayer.[273] More recently, the

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Chase might well have had a bad influence, and would have encouraged the Republicans in their assaults upon the power of the judiciary.").

[263] Humphrey, *supra* note 134, at 298.

[264] *Id. See also* Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service–And Disservice–1789-1992*, 142 U. PA. L. REV. 333 (1993); Knudson, *supra* note 58, at 75 ("[T]here was little doubt that in the first head-on encounter between the newspapers and courts in the young Republic, the judiciary had triumphed but its political role had been blunted.").

[265] Knudson, *supra* note 58, at 71. *See also* Humphrey, *supra* note 134, at 295.

[266] Knudson, *supra* note 58, at 75. *See also* Humphrey, *supra* note 134, at 296.

[267] Knudson, *supra* note 58, at 75. *But see* Lise Olsen & Harvey Rice, *Could Kent Lose His Bench?: Judge May Face Congress Over Abuse Allegations*, HOUSTON CHRON., Oct. 7, 2007, at B1 (reporting on possible impeachment proceedings against United States district Judge Samuel B. Kent for sexual harassment).

[268] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

[269] Christopher T. Handman, *The Doctrine of Political Accountability and Supreme Court Jurisdiction: Applying a New External Constraint to Congress's Exceptions Clause Power,* 106 YALE L.J. 197, 201 n.23 (1996).

[270] William W. Van Alstyne, *A Critical Guide to Ex Parte* McCardle, 15 ARIZ. L. REV. 229, 230 (1973).

[271] *Id.*

[272] *See, e.g.*, Right to Life Act of 1981, H.R. 3225, 97th Cong. § 4 (1981).

[273] *See, e.g.*, Voluntary School Prayer Act of 1981, H.R. 2347, 97th Cong. § 2 (1981). *See also* Ira Mickenberg, *Abusing the Exceptions and Regulations Clause: Legislative Attempts*

Antiterrorism and Effective Death Penalty Act of 1996, the Prison Litigation Reform Act, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 have all contained jurisdiction-stripping provisions.[274] Introduced but unenacted legislation seeks to prevent federal courts from hearing any case involving a federal officer's acknowledgement of God,[275] to prevent federal courts from considering international law,[276] the free exercise or establishment clause,[277] the right to privacy,[278] an equal protection challenge to marriage laws,[279] challenge to specific legislation,[280] challenges to state pornography laws,[281] and royalties under certain offshore oil and gas leases.[282] In one notable speech, Senator Jesse Helms said: "In anticipation of judicial usurpations of power, the framers of our Constitution wisely gave the Congress the authority, by a simple majority of both Houses, to check the Supreme Court by means of regulation of its appellate jurisdiction."[283] Even Chief Justice John Roberts, as a special assistant to Reagan's Attorney General, William French Smith, "provided a vigorous argument as to why it would be constitutional for Congress to enact a law that would strip the Supreme Court of jurisdiction over school prayer and busing cases."[284] The most well-known, and perhaps notorious, example of jurisdiction stripping, however, remains *Ex parte McCardle.*[285]

A. The South Attempts to Use the Courts to Thwart Reconstruction

After the Civil War, Republicans embarked on an ambitious plan of Reconstruction. After adopting the Thirteenth, Fourteenth and Fifteenth Amendments, Congress also "adopted far-reaching substantive statutes to secure the federal protection of civil rights and civil liberties."[286] To ensure these statutes were not subverted by legacy Southern governments, "Congress enacted sweeping Reconstruction legislation that placed much of the South under military government" in 1867.[287]

The Southern aristocracy, alarmed at the plans launched by Radical Republicans to address Reconstruction (especially those aimed at the so-called

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to Divest the Supreme Court of Appellate Jurisdiction, 32 AM. U. L. REV. 497, 497 (1983) (tracing jurisdiction stripping attempts in the 1980's).

[274] For a discussion of these laws, see generally Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts–Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445 (1998).

[275] Constitution Restoration Act of 2005, H.R. 1070, 109th Cong. § 101 (1st Sess. 2005).

[276] *Id.* § 201.

[277] We the People Act, H.R. 300, 110th Cong. § 3(1)(A) (1st Sess. 2007).

[278] *Id.* § 3(1)(B).

[279] *Id.* § 3(1)(C).

[280] Marriage Protection Act of 2007, H.R. 724, 110th Cong. § 2 (1st Sess. 2007).

[281] The Pornography Jurisdiction Limitation Act of 2006, H.R. 5528, 109th Cong. § 2 (2d Sess. 2006).

[282] Deep Water Royalty Jurisdiction Act, H.R. 5231, 109th Cong. § 2 (2d Sess. 2006).

[283] 125 CONG. REC. 7579 (1979) (statement of Sen. Helms).

[284] Neil A. Lewis, *Newly Released Memos Show More of Roberts's Role in Earlier Administrations*, N.Y. TIMES, Aug. 12, 2005, at A14.

[285] *Ex Parte* McCardle, 74 U.S. (7 Wall.) 506 (1868).

[286] Alstyne, *supra* note 270 at 236.

[287] William H. Rehnquist, *The Supreme Court: "The First Hundred Years Were the Hardest,"* 42 U. MIAMI L. REV. 475, 485 (1988).

Black Codes which permitted a form of slavery to continue in the South), attempted several times to use the courts to attack these plans.[288] In *Mississippi v. Johnson*,[289] the suit sought to enjoin the President from enforcing the Reconstruction Acts as unconstitutional.[290] The Court failed to reach the merits of the case, holding instead that the President was immune from such suits.[291] In another case, *Georgia v. Stanton*,[292] the Court held that a suit to enjoin a cabinet member from enforcing the Reconstruction Acts was a nonjusticiable political question,[293] thus once again avoiding a direct confrontation with the Republicans. Any hopes the Southerners held for help from President Johnson were quickly dwindling as the Republicans continuously blocked his efforts to moderate Reconstruction, leading to his eventual impeachment and trial in the middle of the *McCardle* affair.[294]

B. Ex parte Milligan *and the Congress-Court Relationship*

One of the tools the Republicans deployed in the South was to replace civilian courts with military commissions. In *Ex parte Milligan*,[295] the Court finally tackled the constitutionality of this central tenet of the Republicans' plans.[296] The Court held that using military commissions to try citizens when functioning civilian courts were available violated the Constitution.[297] The Court was so sensitive to the case that it prevented reporters from taking notes during the reading of the opinion "to ensure accuracy when the decisions themselves were published."[298] "The decision outraged the Radical Republicans," and "[t]he Radical Republican press described the Court's decision as 'judicial tyranny' and 'constitutional twaddle.'"[299] In enforcing the Court's decision, President Johnson ended the use of military tribunals to try Southern civilians, a move that prompted a motion to impeach him.[300] Meanwhile, Congress examined means of retaliating against the Court by introducing legislation to restrict the number of Justices by preventing appointments as vacancies occurred.[301] Congressman Thaddeus Stevens used the *Milligan* decision to

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[288] *See* Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1594 (1986).
[289] Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1866).
[290] *Id.* at 475.
[291] *Id.* at 501.
[292] Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1867).
[293] *Id.* at 77. *See also* Stanley Kutler, *Ex parte* McCardle*: Judicial Impotency? The Supreme Court and Reconstruction Reconsidered*, 72 AM. HIST. REV. 835, 839 (1967) (noting the *Georgia* and *Mississippi* decisions helped the Court avoid a "direct confrontation" with Congress).
[294] *See* Clinton, *supra* note 288, at 1595, 1599 n.306, 600.
[295] *Ex Parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).
[296] *Id.* at 108-09.
[297] *Id.* at 107.
[298] Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1, 11 (2002).
[299] Clinton, *supra* note 288, at 1594 n.288 (quoting WALTER F. MURPHY, CONGRESS AND THE COURT: A CASE STUDY IN THE AMERICAN POLITICAL PROCESS 36 (1962)).
[300] *Id.*
[301] *Id.* at 1595 n.288.

push through more Reconstruction legislation, claiming the Court's decision made immediate action by Congress "absolutely indispensable."[302] *Milligan,* he argued, "'may appear 'not as infamous as the *Dred Scott* decision', but in truth it was 'far more dangerous' by reason of 'its operation upon the lives and the liberties of the loyal men', black and white, in the South.'"[303] Congressman James Ashley from Ohio "reminded his audience that if the Court again issued a 'political decision,' Congress could take advantage of the constitutional mode of getting rid of the Court, as well as the President."[304] Congressman Ashley felt the Constitution made the legislative branch the "master of the situation."[305]

Some commentators have described Reconstruction as the "ultimate judicial acceptance of legislative control over judicial power."[306] Chief Justice Rehnquist described the period as one where the Court entered a "'Babylonian captivity' to the radical Republicans in Congress."[307] The Court's opinion in *Dred Scott v. Sandford*[308] still angered the Republicans, and they were not willing to allow the Court to once again interfere with their plans.[309] *Milligan* continued to feed the worst of Republican fears about judicial usurpation of Reconstruction plans and Congress was swift to move to protect the legislation.[310] *Milligan* sent a "wave of alarm through the [Republican] party."[311] The party's determination to protect Reconstruction legislation defined its relationship with the Court.[312] The Justices, therefore, had to themselves "walk a very narrow and careful path during this period."[313]

Congressional retaliation for *Milligan* was swift. In 1866, the same year as *Milligan*, Congress moved to provide that no vacancy on the Court would be filled until the Court fell to six members.[314] (There is some evidence to suggest that Chief Justice Chase was involved in this legislation, suggesting the reduction in numbers in order to justify his call for an increase in Justices' salaries.[315] In 1869, just ten days after Republicans celebrated the swearing-in of President Ulysses Grant, they raised the number of Justices again, "allowing President Grant to appoint an additional Justice."[316]) In 1867, Congress debated legislation to decrease the number of Justices that constituted a quorum

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[302] Kutler, *supra* note 293, at 837.
[303] Friedman, *supra* note 298, at 14 (quoting 6 CHARLES FAIRMAN, HISTORY OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-88 PART ONE, at 267 (1971)) (internal quotations omitted).
[304] Kutler, *supra* note 293, at 837.
[305] *Id.*
[306] Clinton, *supra* note 288, at 1594.
[307] Rehnquist, *supra* note 287, at 485.
[308] Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1856).
[309] *See* Rehnquist, *supra* note 287, at 485.
[310] Kutler, *supra* note 293, at 837.
[311] *Id.* at 837-38.
[312] *Id.* at 837.
[313] Friedman, *supra* note 298, at 6.
[314] Act of July 23, 1866, ch. 210, 14 Stat. 209.
[315] Rehnquist, *supra* note 287, at 486. Chief Justice Chase also pressed for legislation changing his title from "Chief Justice of the Supreme Court of the United States" to "Chief Justice of the United States." *Id.*
[316] Clinton, *supra* note 288, at 1596 n.293.

from six to five.[317] Then, in 1868, Congress proposed legislation that would have required a two-thirds majority from the Court to invalidate legislation as unconstitutional.[318] There is some evidence to suggest that this last piece of legislation was a direct response to fears that the Court would hear the *McCardle* case and eventually overrule a key piece of Reconstruction legislation.[319] Senator Charles Sumner, in a speech advocating passage of the bill, said allowing a bare majority of the court to void acts of Congress was "'contrary to reason, almost contrary to common sense.'"[320] Ultimately, the proposal to require two-thirds vote of the Court to overturn Congress failed.[321] As one commentator said: "There was, in any event, an ambiguous and unreal quality to the two-thirds proposal, for it amounted to saying that six justices might do what five could not."[322] The press joined in the criticism of the Court, with the *New York Herald,* for example, editorializing in 1867:

> Shall the opinions of a bare majority of these nine old superannuated pettifoggers of the Supreme Court, left to the country as the legacy of the old defunct Southern slaveholding oligarchy, prevail, or shall these old marplots make way for the will of the sovereign people and the national constitution as expounded by Washington and Hamilton, and as established by a million of Union bayonets in a four years' civil war? That is the great question for 1868.[323]

At the same time, the battle between Congress and the President was already in full swing. The "predominant question[ ] that split the branches [was] the terms on which the Southern states would return to the Union, as well as which branch of government would have the power to make that decision."[324] In 1866, President Johnson had left the Republican Party after he vetoed civil rights legislation and the veto was later overridden.[325] For the remainder of his presidency, he battled Congress' plans for Reconstruction and was eventually impeached, becoming the first President in history to be impeached (he escaped Senate conviction by only one vote).[326] In this highly politicized environment, the Court found itself, in *McCardle,* front and center in the battle over Reconstruction.

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317 S. 163, 40th Cong. (2d Sess. 1867).

318 CONG. GLOBE, 40th Cong., 2d Sess. 478 (1868).

319 See *id.*, where Congressman Williams of Pennsylvania said:

> It is said that there is a case now depending in the Supreme Court of the United States upon which this question may be ruled to-day or to-morrow. Suppose such be the fact–I do not know that there is any such case–but suppose such be the fact, that such a case is now depending there, and a decision is made by the court, what harm can it effect? Instead of harm I think it will do good, because it will awaken both Houses of Congress to the necessity of some such provision as this, intended, as it is, to defend the legislative power, which is the true sovereign power of the nation.

320 Kutler, *supra* note 293, at 838 (quoting CONG. GLOBE, 40th Cong., 2d Sess. 504 (1868)).

321 *Id.*

322 *Id.*

323 *Congress and the Supreme Court–The Great Issue for the Next Presidency*, N.Y. HERALD, Jan. 5, 1867, at 4, *quoted in* Friedman, *supra* note 298, at 24.

324 Friedman, *supra* note 298, at 6.

325 *Id.* at 10.

326 *See id.* at 15.

C. McCardle's Poison Pen

William H. McCardle was an editor of the *Vicksburg Times*.[327] A member of the former Southern aristocracy, he venomously attacked and criticized the Republican plans for Reconstruction.[328] In one 1867 editorial, he wrote:

> We said a few days since that to be a military satrap, in the poor downtrodden South, was, *ex necessitate rei*, to be a scoundrel . . . they [military government] are each and all infamous, cowardly, and abandoned villains who, instead of wearing shoulder straps and ruling millions of people, should have their heads shaved, their ears cropped, their foreheads branded, and their persons lodged in a penitentiary.[329]

He was eventually arrested for disturbing the peace and inciting insurrection, disorder, and violence, in violation of Reconstruction legislation.[330] Since McCardle was detained under the Reconstruction laws, any attack on his detention would necessarily involve an attack on the constitutionality of the Reconstruction laws themselves.[331] That attack came when McCardle petitioned for a writ of habeas corpus in the circuit court at Jackson, Mississippi, claiming his arrest and detention were unconstitutional.[332]

D. 1867 Habeas Corpus Act and McCardle I

McCardle's attack on his detention was based on the habeas corpus statute of February 5, 1867.[333] This legislation had greatly expanded the prior habeas corpus statute[334] "to afford federal protection to the wives and children of black soldiers who enlisted in the Union Army"[335] and to "destroy the vestiges of slavery."[336] It was also seen as a "means of enforcing the recently ratified Thirteenth Amendment."[337] According to the bill's sponsors, Representative William Lawrence and Senator Lyman Trumbull, the Act was designed to protect former slaves "who were being reduced to new forms of slavery because of state vagrancy and apprentice laws," the so-called Black Codes.[338] Prior to passage of the law, the writ could only be obtained before trial, and it could only be used "to question the legality of [a] detention by executive officials."[339] The 1867 law allowed "a form of review after trial of federal and state convic-

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[327] Clinton, *supra* note 288, at 1595.

[328] *Id.*

[329] Alstyne, *supra* note 270, at 236 n.42.

[330] Clinton, *supra* note 288, at 1595; Handman, *supra* note 269, at 202.

[331] Clinton, *supra* note 288, at 1595.

[332] *Id.*

[333] *Id. See also* Habeas Corpus Act of 1867, ch. 27, 14 Stat. 385.

[334] The prior habeas corpus statute was the Judiciary Act of 1789, a "restrictive" grant of habeas power. William M. Wiecek, *The Great Writ and Reconstruction: The Habeas Corpus Act of 1867*, 36 J.S. HIST. 530, 533 (1970). *See also* Judiciary Act of 1789, ch. 20, 1 Stat. 73.

[335] Clinton, *supra* note 288, at 1595.

[336] Wiecek, *supra* note 334, at 536.

[337] *Id.* at 538.

[338] Kutler, *supra* note 293, at 840.

[339] Wiecek, *supra* note 334, at 531.

tions."[340] In this way, the 1867 law "enabled the federal courts to assert their primacy in deciding questions affecting individual liberty."[341]

The circuit court rejected McCardle's petition, but released him on $2000 bail.[342] Throughout the remainder of the litigation, McCardle "continued to write diatribes against" Reconstruction and officials implementing it.[343] Under the new 1867 habeas corpus legislation, appeals could be taken directly to the Supreme Court, allowing McCardle's counsel to take his case there.[344]

The government, led by Senator Trumbull, immediately filed a motion to dismiss for lack of jurisdiction under the 1867 Act.[345] "[On] February 17, 1868 Chief Justice Chase rejected [the] government['s] motion to dismiss."[346] He held the Act was "of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction."[347] He concluded that the Court "entertain[s] no doubt, therefore, that an appeal lies to this court from the judgment of the Circuit Court in the case before us."[348]

Oral argument in *McCardle* was scheduled and extended beyond the time normally granted–two hours per side, to six hours per side, for a total of four days.[349] On one of the argument days, argument was interrupted while Chief Justice Chase presided over a Senate trial in the impeachment of President Johnson.[350] During argument, McCardle's lawyers argued that Congress could not turn Mississippi into a military district at peacetime, relying on *Milligan.*[351] The government urged the Court to dismiss the case as a political question.[352] The case was submitted on March 9, 1868.[353]

E. 1867 Act Repealed

The Court was never able to deliver its judgment on the constitutionality of McCardle's detention by military authorities in the South. The Republicans were "[a]larmed and unified" that the Court had agreed to hear McCardle's case.[354] "By the time that the Court held its conference on the *McCardle* case, on March 21, 1868," legislation that would strip the Court of jurisdiction to hear any cases under the 1867 Habeas Corpus Act had passed "both houses of

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340 *Id.* (emphasis omitted). *See also* Habeas Corpus Act of 1867, ch. 27, 14 Stat. 385.
341 Wiecek, *supra* note 334, at 532.
342 Clinton, *supra* note 288, at 1595.
343 *Id.*
344 *See* Habeas Corpus Act of 1867, ch. 27, 14 Stat. 385.
345 Kutler, *supra* note 293, at 840. *See also* Alstyne, *supra* note 270, at 237-38 (explaining in detail the nature of the government's motion to dismiss); Habeas Corpus Act of 1867, ch. 27, 14 Stat. 385 (1868).
346 Clinton, *supra* note 288, at 1598.
347 *Ex parte* McCardle, 73 U.S. (6 Wall.) 318, 325-26 (1868).
348 *Id.* at 326.
349 Rehnquist, *supra* note 287, at 487.
350 REHNQUIST, *supra* note 56, at 271.
351 *Id.* at 271-72.
352 Rehnquist, *supra* note 287, at 487.
353 Clinton, *supra* note 288, at 1599.
354 Wiecek, *supra* note 334, at 542.

Congress and awaited President Johnson's signature."[355] The law was introduced quietly in the House, as an amendment to another bill to amend the Judiciary Act of 1789 to provide for Supreme Court review of any judgment against a revenue officer.[356] "The amendment passed . . . without debate or division."[357] The legislation encountered violent opposition in the Senate, with the Democrats becoming "ardent defenders of the federal judiciary . . . ."[358] In further debate in the House, Representative Robert Schneck, one of the sponsors of the repealer legislation, revealed his true intention, saying:

> I have lost confidence in the majority of the Supreme Court. . . . I believe that they usurp power whenever they dare to undertake to settle questions purely political, in regard to the status of the States, and the manner in which those States are to be held subject to the lawmaking power.[359]

He insisted he had a right to "'clip the wings of that [C]ourt whenever I can, in any attempt to take such flights.'"[360]

There is also some evidence that Republicans were motivated in large part by the Democratic press of the day, which had been crowing about the Court's upcoming ruling in *McCardle*.[361] Representative Wilson claimed Republicans would not have intervened with the Court, but:

> [W]hen we were told day by day that the majority of the court has practically made up its judgment, not only to pass upon the sufficiency of the return to the writ, which involves the only question properly before them in the McCardle case, but also to do as the court did once before in the Dred Scott case, go outside of the record properly involving the questions really presented for its determination, undertaking to infringe upon the political power of Congress, and declare the laws . . . unconstitutional, it was our duty to intervene by a repeal of the jurisdiction and prevent the threatened calamity falling upon the country.[362]

"The calamity [he] feared was, in his own words, 'that the McCardle case was to be made use of to enable a majority of that Court to determine the invalidity and unconstitutionality of the reconstruction laws of Congress.'"[363]

If the Court wanted to, it could have decided the *McCardle* case there and then, sidestepping the issue of the jurisdiction-stripping legislation before it became law. At the conference, however, the Court decided instead to postpone consideration of the *McCardle* case until the fate of the legislation was known.[364] Justices Robert Grier and Stephen Field vehemently opposed the decision to delay the case, but they were unable to convince their colleagues to change their minds.[365] Justice David Davis characterized the delay as being

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[355] Clinton, *supra* note 288, at 1599.
[356] Kutler, *supra* note 293, at 840.
[357] *Id.*
[358] Wiecek, *supra* note 334, at 542.
[359] Kutler, *supra* note 293, at 841 (quoting CONG. GLOBE, 40th Cong., 2d Sess. 1883-84 (1868)).
[360] *Id.* (quoting CONG. GLOBE, 40th Cong., 2d Sess. 1883-84 (1868)).
[361] *Id.* at 841-42.
[362] *Id.* at 842 (quoting CONG. GLOBE, 40th Cong., 2d Sess. 2062 (1868)).
[363] Alstyne, *supra* note 270, at 239 (quoting CONG. GLOBE, 40th Cong., 2d Sess. 2062 (1868)).
[364] Clinton, *supra* note 288, at 1599-1600 n.306.
[365] *Id.* Justice Grier wrote:

"'unjudicial to run a race with Congress, and especially as the bill might be signed at any moment by the President.'"[366] "McCardle's lawyers feared the worst," with one "express[ing] his outrage at what he viewed as the Court's 'knuckling under'."[367] Jeremiah Black, another lawyer for McCardle, "bitterly complained that 'the court stood still to be ravished and did not even hallo while the thing was being done.'"[368]

On March 25, 1868 (four days after the Court's conference on *McCardle* and five days before his impeachment trial began), President Johnson vetoed the repealer legislation.[369] President Johnson felt that the legislation was "not in harmony with the spirit and intention of the Constitution," and that the bill "establishes a precedent which, if followed, may eventually sweep away every check on arbitrary and unconstitutional legislation."[370] Two days later, Congress overrode the President's veto and the bill became law.[371] Senator Trumbull, in arguments for the override, allayed Democratic fears about repealing the 1867 habeas corpus law, arguing the country "had survived quite well" under the older 1789 law.[372] Trumbull concluded that the 1867 law had been meant to protect federal officers and newly-freed slaves in the South and the Court had misconstrued the original meaning of the 1867 law, thus making repeal necessary.[373]

The Court scheduled a new set of oral arguments for its December 1868 term on the effect the repealer legislation had on the already-submitted *McCardle* case.[374] "McCardle's counsel called [the case] 'one of the greatest cases that has ever been heard before any tribunal.'"[375] On April 12, 1869, the Court handed down its decision in *McCardle*.[376] In the opinion, Chief Justice Chase notes the appellate jurisdiction of the Supreme Court is granted "with such exceptions and under such regulations as Congress shall make."[377] According to Chief Justice Chase, the repealer bill's repeal of the grant of jurisdiction in the 1867 Act was complete and effective: "It is hardly possible to imagine a

> The country and the parties had a right to expect that it [*McCardle* case] would receive the immediate and solemn attention of this court. By the postponement of the case we shall subject ourselves, whether justly or unjustly, to the imputation that we have evaded the performance of a duty imposed on us by the Constitution, and waited for legislation to interpose to supersede our action and relieve us from our responsibility. I am not willing to be a partaker of the eulogy or opprobrium that may follow . . . .

Id. (citations omitted).

366 Kutler, *supra* note 293, at 844 (quoting Justice Davis).

367 Rehnquist, *supra* note 287, at 488 (quoting C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-88 PART ONE 478 (1971).

368 Kutler, *supra* note 293, at 848.

369 Clinton, *supra* note 288, at 1600.

370 CONG. GLOBE, 40th Cong., 2d Sess. 2094 (1868).

371 Act of March 27, 1868, ch. 34, 15 Stat. 44.

372 Kutler, *supra* note 293, at 843.

373 *Id.*

374 Clinton, *supra* note 288, at 1601.

375 *Id.* at 1594 (quoting 4 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-88, at 452 (1971)).

376 *Ex Parte* McCardle 74 U.S. (7 Wall.) 506 (1869). *See also* Clinton, *supra* note 288, at 1601.

377 *McCardle*, 74 U.S. (7 Wall.) at 513.

plainer instance of positive exception."[378] Chief Justice Chase was reluctant to look beyond the plain meaning of the statute, writing: "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words."[379] Chief Justice Chase therefore summarily dismissed the case, writing:

> What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.[380]

In addition to fears of Congressional tampering with the Court's processes and numbers, *McCardle* was being decided against the backdrop of Chief Justice Chase's own political ambitions. While he claimed he was "neither candidate nor aspirant, . . . Chief Justice Chase, in addition to his duties as Chief Justice and [his role as] presiding judge of [President Johnson's] impeachment tribunal, was [also] quietly seeking the 1868 nomination for the presidency. . . ."[381] He unsuccessfully tried to secure the Democratic nomination after Grant appeared to receive the Republican nomination.[382] He was "so bitten by the Presidential bug" that he tried again to win a nomination in 1872.[383]

F. Post McCardle*:* Yerger

Although the Court never ruled on the merits of McCardle's military detention, Republican apprehensions about what the Court would have done appeared justified. In correspondence with the Mississippi federal judge who had initially dismissed McCardle's habeas petition, Chief Justice Chase wrote, "had the merits of the McCardle Case been decided the Court would doubtless have held that his imprisonment for trial before a military commission was illegal."[384] Significantly, the Court's holding in *McCardle* was limited only to the effectiveness of the repeal of the 1867 *habeas corpus* law.[385] In the opinion, Chief Justice Chase tantalizingly wrote:

> Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.[386]

In writing so, Chief Justice Chase hinted broadly that Section 14 of the Judiciary Act of 1789, an older *habeas corpus* statute, was unaffected by the repealer law.[387]

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[378] *Id.* at 514.
[379] *Id.*
[380] *Id.*
[381] Clinton, *supra* note 288, at 1597-98.
[382] *Id.* at 1598.
[383] Rehnquist, *supra* note 287, at 486.
[384] Clinton, *supra* note 288, at 1599.
[385] *See* Handman, *supra* note 269, at 203 (quoting *McCardle*, 74 U.S. (7 Wall.) at 515).
[386] *McCardle*, 74 U.S. (7 Wall.) at 515.
[387] *See* Handman, *supra* note 269, at 203.

Indeed, six months later, Chief Justice Chase was able to prove his point. A civilian, Edward M. Yerger, had been arrested and detained for trial by a military commission in Mississippi for murder of an Army officer.[388] Yerger applied to the United States Circuit Court for the Southern District of Mississippi for a writ of *habeas corpus,* which was denied.[389] He then appealed to the Supreme Court.[390] Yerger's lawyers accepted Chief Justice Chase's invitation in *McCardle* and based their appeal on the original Judiciary Act of 1789.[391] Chief Justice Chase, on behalf of a unanimous Court, affirmed the Court's jurisdiction to issue the writ.[392] In *Ex parte Yerger*, Chase wrote:

> Our conclusion is, that none of the acts prior to 1867, authorizing this court to exercise appellate jurisdiction by means of the writ of habeas corpus, were repealed by the act of that year . . . and [the 1868 repealer act] must be limited in effect to the appellate jurisdiction authorized by the act of 1867.[393]

The Court scolded Congress for the 1868 repealer law, saying: "legislation of this character is unusual and hardly to be justified except upon some imperious public exigency" and asserted that its jurisdiction in *habeas* cases "derived from the Constitution" and was only "defined" by the 1789 Act.[394]

The legislative response to *Yerger* was far more muted than the roar over *McCardle*. Representative Sumner proposed "abolishing the Court's appellate jurisdiction in causes commenced by the writ of *habeas corpus*."[395] "Senator [Charles Drake] proposed [an] outright abolition of judicial review of congressional acts."[396] The proposals failed, perhaps as a result of the end of military reconstruction, even in Mississippi.[397] Before Senator Drake's bill was killed, however, several lawmakers engaged in passionate defense of the Court.[398] Republican Senator George Edmunds, from Vermont, said history demonstrated:

> [The] greatest safeguard of liberty and of private rights . . . is found, not in the legislative branch of government, not in the executive branch . . . , but in its fundamental law that secures those private rights, administered by an independent and fearless judiciary. There is the security of liberty; there is the security of progress in society; there is the anchor that holds together the wishes of all good men.[399]

G. Historical Treatment of McCardle

McCardle has predictably generated volumes of scholarship about its meaning and impact.[400] Some scholars have been very critical, saying "what

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[388] Kutler, *supra* note 293, at 845-46.
[389] *Id.* at 846.
[390] *Id.*
[391] *Id.*
[392] *Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 106 (1868).
[393] *Id.*
[394] *Id.* at 102, 104.
[395] Kutler, *supra* note 293, at 849.
[396] *Id.*
[397] *Id.* at 850.
[398] *Id.*
[399] *Id.*
[400] *See, e.g.*, Handman, *supra* note 269, at 202 n.27 ("The vast body of commentary makes it impossible to provide an exhaustive list of sources" of scholarly articles on this topic.).

the country actually got from the Court in *McCardle* was a belated and ill-considered evasion of the Court's judicial responsibilities."[401] Chief Justice Rehnquist opined that *McCardle* represented a "nadir in its prestige and authority, which had begun to decline with the decision in *Dred Scott* a decade before."[402] Justice Benjamin Curtis, in an "often quoted letter, resignedly noted 'that the legislative power, . . . with the acquiescence of the country, conquered one President, and subdued the Supreme Court."[403] Others are more sanguine, opining that statutes and court opinions of that era reveal "a consistent determination by Congress and the courts to enhance the powers and role of the federal courts, not to emasculate them."[404] Another commentator says *McCardle* "challenges the traditional idea of an impotent and quiescent judiciary and suggests, instead, a beginning of the boldness and vitality that characterized the Court in later years."[405]

Of course, one's view of *McCardle*'s impact depends on how one reads the opinion. Some read it as a complete abdication of judicial responsibility to Congress,[406] while others see it as a nuanced and politically savvy decision by a Court keenly aware of its position in Washington at that time.[407] Some scholars have used the decision to argue that in spite of the opinion's seemingly broad grant of authority to Congress to carve "exceptions" to appellate jurisdiction, Congress cannot take away jurisdiction from the Court's "essential role" in the constitutional plan,[408] while others have argued that the opinion justifies an absolutist view, espousing the theory that Congress has plenary authority to restrict the Court's jurisdiction.[409] At least one scholar has suggested that *McCardle* would be treated very differently today in light of the Court's development of Fifth Amendment jurisprudence:

> [T]he use by Congress of the exceptions power to single out a class of cases involving fundamental rights, withdrawn from the Supreme Court's appellate jurisdiction only from dissatisfaction with the Court's exercise of its power of substantive constitutional review in respect to such cases, may, ironically, today be subject to fifth amendment challenge.[410]

Ultimately, understanding the forces at play during Reconstruction and the Court's relationship with Congress is important because, "taken together, they determine the level of independence of the judiciary from popular politics. Too

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401 Clinton, *supra* note 288, at 1598.

402 Rehnquist, *supra* note 287, at 488.

403 Kutler, *supra* note 293, at 845.

404 Wiecek, *supra* note 334, at 531.

405 Kutler, *supra* note 293, at 836.

406 *See, e.g.*, Clinton, *supra* note 288, at 1607 ("Congress and the Supreme Court had stood toe to toe, locked in constitutional combat, and the Court had chosen to do more than merely blink. It vigorously waved a white flag of surrender without putting up any constitutional fight whatsoever.").

407 *See, e.g.,* Handman, *supra* note 269, at 203 ("The Court, no doubt, recognized that a contrary decision [in *McCardle*] would invite an inevitable dispute with Congress.").

408 *See generally id.* at 206.

409 *See generally id.* at 208. *See also* Ralph A. Rossum, *Congress, the Constitution, and the Appellate Jurisdiction of the Supreme Court: The Letter and the Spirit of the Exceptions Clause*, 24 WM. & MARY L. REV. 385 (1983).

410 Alstyne, *supra* note 270, at 265.

much judicial independence may threaten popular sovereignty; too little may undermine individual liberty."[411]

The specter of lifetime-appointed judges voiding key building blocks of Reconstruction proved too much for the Republicans and they felt compelled to act in a manner that posed a dangerous threat to an independent judiciary. While the immediate crisis was averted through the Court's recognition that it should not "run a race" with Congress and its skillful postponement of the issues to another day, the threat of jurisdiction-stripping remains very much a key instrument in the legislative toolbox to control a judiciary it views as lawless. The Military Commissions Act[412] is the direct descendant of *McCardle,* and it is undoubtedly not the last example of a frustrated Congress reacting to judges viewed as extraordinarily political.

V. COURT PACKING

A reasonable assertion is that during Reconstruction, the Radical Republicans in Congress were so intent on their legislative agenda for the South that they were willing to conveniently ignore, or steamroll through, the role of the President and the Supreme Court in achieving their goals. Seventy years later, the Court would find itself once again in the cross-hairs of a branch of government focused singularly on its own agenda. This time, it was the presidency in the form of President Roosevelt that took aim at the Court. Unlike the Congress in 1868, however, which conveniently relied on the Exceptions Clause to take away the *McCardle* case from the Court, the President's power over the Court rested not in jurisdiction, but in appointment. In 1866, Congress provided that the number of Justices would be reduced by attrition, from ten to seven, to prevent President Johnson from making any Supreme Court appointments.[413] In 1869, after President Johnson left office, the number of Justices was raised to nine, where it has remained ever since.[414] In 1937, however, in a daring and unprecedented move to preserve his New Deal legislation from constitutional death, President Roosevelt proposed a plan that would bring the number of members on the Court up to fifteen.[415]

A. President Roosevelt's First Two Years

The "cataclysmic economic turmoil" of the Depression, along with the rise of dictatorships around the world, led to President Roosevelt's election in 1932.[416] President Roosevelt offered to use the massive power of the federal government to help a people in need, and the public responded with force.[417] During President Roosevelt's first term in office, which began in 1932, he was unable to make any appointments to the Court, a relative rarity in any given

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411 Friedman, *supra* note 298, at 2.
412 Military Commissions Act of 2006, 10 U.S.C. § 948a (2006).
413 Act of July 23, 1866, ch. 210, 14 Stat. 209.
414 Judiciary Act of 1869, ch. 22, 16 Stat. 44.
415 *See infra* pp. 118-121.
416 Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 1005-07 (2000).
417 *Id.* at 1008.

presidency.[418] This may not have bothered Roosevelt too much because the Court was not directly involved with ruling on the constitutionality of New Deal legislation in the first two years of his presidency.[419] Challenges were still winding their way through the lower courts and President Roosevelt had his hands full dealing with the Great Depression.[420] "During a period known as the 'Hundred Days' in 1933, Roosevelt sent to Congress a list of 'must' legislation" he deemed necessary to allow the country to recover from the Depression.[421] Reform measures included the National Industrial Recovery Act,[422] passed in 1933, a series of statutes to end unregulated competition, increase prices through production limitations, and a "guarantee [of] a reasonable workweek and a living wage."[423]

B. Court Strikes Down New Deal

As the Supreme Court prepared to move to its new building in Washington, the country anticipated a looming showdown over the constitutionality of Roosevelt's plans. *Harper's Magazine* wrote: "Withdrawn from all the noise and tumult sit the nine old men; they are waiting, waiting for the time when the question of this government control [to lead the country out of the Depression] must be brought before them."[424] In 1935, seven of the nine justices had been appointed by Republican Presidents.[425] The Court adhered to a "freedom-of-contract" theory in the Due Process Clause in its constitutional jurisprudence, and this theory began affecting the outcome of New Deal legislation.[426] The main proponents of this theory were called the "Four Horsemen of the Apocalypse because of their dire warnings about the catastrophic consequences of regulatory legislation."[427] The Four Horsemen "rode in the same automobile to and from the Supreme Court building for oral arguments and for the Saturday conferences of all nine Justices at which they decided the cases."[428] The Four Horsemen were:

> Willis Van Devanter, appointed by President Taft in 1910 . . . ; James Clark McReynolds, appointed by President Wilson to get rid of him as United States Attorney General; Pierce Butler, a railroad lawyer appointed by President Harding in 1922. . . ; and George Sutherland, another Harding appointee of that year and a

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[418] *See, e.g.*, The Supreme Court Historical Society, Appointees Chart, http://www.supremecourthistory.org/myweb/fp/courtlist2.htm (last visited Sept. 4, 2008).

[419] REHNQUIST, *supra* note 56, at 117.

[420] *Id.* at 116.

[421] William H. Rehnquist, *The American Constitutional Experience: Remarks of the Chief Justice,* 54 LA. L. REV. 1161, 1169 (1994).

[422] National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933).

[423] REHNQUIST, *supra* note 56, at 116-17.

[424] Mitchell Dawson, *The Supreme Court and the New Deal*, HARPER'S MAG. 641, Nov. 1933, at 641, *quoted in* Friedman, *supra* note 416, at 989.

[425] REHNQUIST, *supra* note 56, at 117.

[426] Rehnquist, *supra* note 421, at 1169.

[427] William G. Ross, *When Did the "Switch in Time" Actually Occur?: Re-discovering the Supreme Court's "Forgotten" Decisions of 1936-1937*, 37 ARIZ. ST. L.J. 1153, 1159 (2005).

[428] Joseph L. Rauh, Jr., *An Unabashed Liberal Looks at a Half-Century of the Supreme Court*, 69 N.C. L. REV. 213, 214 (1990).

former Republican Senator who had fought against Louis Brandeis's confirmation in 1916.[429]

They were opposed by the liberal "Three Musketeers:" Louis Brandeis (appointed by President Wilson in 1916), Benjamin Cardozo (appointed by President Hoover in 1932, former Chief Judge of the New York Court of Appeals), and Harlan Stone (appointed by President Coolidge in 1925, former Dean of Columbia Law School and United States Attorney General).[430]

The swing votes were Chief Justice Charles Evans Hughes and Associate Justice Owen Roberts.[431] When Chief Justice Taft retired in 1930, President Hoover felt obligated to offer the position to Justice Hughes, who served an earlier stint as Associate Justice.[432] An aide informed President Hoover that a "safe" offer could be made to Hughes for the Chief position because he would have to decline "since his son, Hoover's Solicitor General, would resign his post as the government's spokesman before the Court if his father became Chief Justice."[433] President Hoover offered the position to Justice Hughes on the phone, and after a while, hung up and blurted: "The son of a bitch doesn't give a damn about his son's career."[434] Together, Chief Justice Hughes and Justice Roberts were the swing votes who would hold the fate of the New Deal legislation in their hands. Although considered one of the more "political" courts in history, the Justices "sternly shunned" the electoral process by refraining from voting in national or state elections.[435]

On May 27, 1935 (a day later known to New Dealers as "Black Monday"), the nation discovered how the Supreme Court would rule on the New Deal.[436] In *Louisville Joint Stock Land Bank v. Radford*, the Court ruled that Congress could not provide for mortgage relief measures, including the ability of the debtor to discharge the note based on currently appraised value of the land rather than on the face value of the mortgage, without providing just compensation.[437] In *Humphrey's Executor v. United States*, the Court held that President Roosevelt did not have the power to remove a member of the Federal Trade Commission simply because he disagreed with the member's political philosophy.[438] And, in a unanimous decision, the Court in *Schechter Poultry Corp. v. United States* held that Congress lacked the power under the interstate commerce clause to pass the National Industrial Recovery Act.[439] At a press conference later that week, President Roosevelt was quoted as saying: "We are the only nation in the world that has not solved that problem. We thought we were solving it, and now it has been thrown straight in our faces and we have been relegated to the horse-and-buggy definition of interstate commerce."[440]

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429 *Id.*
430 *Id.*
431 *Id.*
432 *Id.*
433 *Id.* at 214-15.
434 *Id.* at 215.
435 *Id.* at 219.
436 REHNQUIST, *supra* note 56, at 117.
437 Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 594, 601-02 (1935).
438 Humphrey's Ex'r v. United States, 295 U.S. 602, 631-32 (1935).
439 A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550-51 (1935).
440 REHNQUIST, *supra* note 56, at 119.

Other decisions followed. In January 1936, the Four Horsemen, together with Justices Roberts and Hughes, voided the Agricultural Adjustment Act of 1933 in *United States v. Butler*.[441] In response, "six members of the Court were hanged in effigy" in Iowa.[442] After *Butler,* President Roosevelt received a tremendous volume of mail from the public, mostly focused on the Court's age and its inability to grasp the plight of the American public.[443] In May that year, the Court voided legislation on the coal industry in *Carter v. Carter Coal Co.*,[444] and in June, the Court handed down *Morehead v. New York ex rel. Tipaldo*,[445] in which the Four Horsemen, along with Justice Roberts, voided a New York state minimum wage law for women and children.[446] The *Tipaldo* decision shocked even many conservatives and "ignited a firestorm of controversy."[447] One regional member of the National Labor Relations Board said: "[A]ll we want is a fair [C]ourt–not a [C]ourt remote and detached from the conditions in the world today, a world in which the majority of the [C]ourt have not even lived for the past twenty years."[448] A letter-writer to President Roosevelt questioned the "'fitness of "that body of nine old hasbeens, half-deaf, half-blind, full-of-palsy men. . . . That they are behind the times is very plain – all you have to do is look at Charles Hughes' whiskers."'"[449] The New Deal was popular with the country, and invalidating key portions of it alienated the Court.[450]

At his 1937 State of the Union Address, President Roosevelt insisted that "means must be found to adapt our legal forms and our judicial interpretation to the actual present national needs of the largest progressive democracy in the modern world."[451] Washington was soon awash in discussion about various proposals, such as using constitutional amendments to expand the scope of the Commerce Clause, requiring a two-thirds majority of the Court to invalidate laws, and making laws passed by two-thirds of each chamber of Congress unreviewable.[452] In "'1935-1937, . . . saw more Court-curbing bills introduced in Congress than in any other three-year (or thirty-five year) period in history.'"[453] President Roosevelt observed that the Court interpreted the Constitution as disallowing state and federal governments from addressing the Depression, creating a "No-Man's Land."[454]

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441 United States v. Butler, 297 U.S. 1, 74, 78 (1936).

442 Friedman, *supra* note 416, at 993-94.

443 *Id.* at 1020.

444 Carter v. Carter Coal Co., 298 U.S. 238, 316-17 (1936).

445 Morehead v. New York *ex rel* Tipaldo, 298 U.S. 587 (1936).

446 *Id.* at 618.

447 Ross, *supra* note 427, at 1160.

448 Friedman, *supra* note 416, at 1020.

449 *Id.* at 1021 (quoting WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN 96-97 (1995)).

450 *See* Barry Cushman, *Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s*, 50 BUFF. L. REV. 7, 19 (2002).

451 Friedman, *supra* note 416, at 1019.

452 Rauh, *supra* note 428, at 215.

453 Friedman, *supra* note 416, at 995.

454 *Id.* at 994.

C. 1936 Election

In the presidential election of 1936, President Roosevelt was re-elected by an overwhelming majority, with his opponent winning only the electoral votes in Maine and Vermont.[455] For the first time in history, the inauguration took place on January 20 rather than on March 4.[456] The Democrats won in Congress as well, with a majority of 333 to 102 in the House, and 75 to 21 in the Senate.[457] President Roosevelt, emboldened by the Democratic win, decided to use that political capital to deal once and for all with the Court. Waiting for vacancies to allow him to appoint justices more inclined to uphold broad grants of federal authority to regulate commerce proved to be too much for him, and he decided instead on a plan that would allow him to increase the number of justices, thus ensuring the conservatives on the Court would be outnumbered.[458] As Attorney General Homer Cummings wrote to President Roosevelt: "The real difficulty is not with the Constitution, but with the Judges who interpret it."[459]

"On Friday, February 5, 1937, members of the President's cabinet, the Democratic leadership in both houses of Congress, and the chairmen of the House and Senate Judiciary Committees were summoned to meet . . . [at] the White House."[460] The President explained to the assembled group that the Supreme Court "stood as a roadblock to the progressive reforms the country had, in the November election, overwhelmingly indicated that it wanted."[461] He then proceeded to outline a draft of a bill he wanted Congress to pass to "reorganize" the federal judiciary.[462]

D. The Judiciary Reorganization Bill of 1937

The plan began with a statement that the federal judiciary was understaffed with insufficient personnel.[463]

> It is true that the physical facilities of conducting the business of the courts have been greatly improved, in recent years, through the erection of suitable quarters, the provision of adequate libraries and the addition of subordinate court officers. But in many ways these are merely the trappings of judicial office. They play a minor part in the processes of justice.[464]

The plan then explained that of the then 237 life tenure judges, twenty-five were over seventy years of age and eligible to leave the bench on full pay.[465] To address the problem of "infirm" judges, in 1913, 1914, 1915 and 1916, "the Attorneys General then in office recommended to the Congress that when a

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455 REHNQUIST, *supra* note 56, at 119.
456 *Id.*
457 Ross, *supra* note 427, at 1160.
458 Friedman, *supra* note 416, at 1023.
459 *Id.* at 1026.
460 REHNQUIST, *supra* note 56, at 119-20.
461 *Id.* at 120.
462 *Id.*
463 President Franklin D. Roosevelt, Judicial Branch Reorganization Plan (Feb. 5, 1937), *available at* http://newdeal.feri.org/speeches/1937b.htm.
464 *Id.*
465 *Id.*

district or a circuit judge failed to retire at the age of seventy, an additional judge be appointed."[466] The plan then called for an increase in the number of judges throughout the federal judiciary, including the Supreme Court, which would allow the President to nominate one additional judge for every judge over the age of seventy that did not choose to retire or resign.[467] If passed, the bill would immediately allow Roosevelt to name an additional six Justices to the Supreme Court, for a total of fifteen Justices.

The plan "stunned" those in the room.[468] Representative Hatton Sumners of Texas, chairman of the House Judiciary Committee opposed the plan, saying: "Boys, here's where I cash in my chips."[469] President Roosevelt, fearing the bill would never leave the House, decided to press the bill first in the Senate.[470] The Republicans, all opposed to the bill, decided to adopt a strategy of silence, fearing that vocal opposition would dampen Democratic objections to the bill.[471]

Urged by Attorney General Cummings, Roosevelt initially adopted the strategy of justifying the bill because of workload and age issues at the Supreme Court.[472] This proved to be a key strategic mistake. Chief Justice Hughes, seventy-four years old, was seen every day "jauntily walking the streets of Washington, more often twirling his cane than leaning on it."[473]

Immediately following the February meeting, reaction from the public and press was swift. "Despite strong public frustration with the courts, something went wrong."[474] At the White House, a change in the strategy was quickly forming. Justice Louis Brandeis, seen as a liberal who had upheld the New Deal legislation, was himself the oldest justice on the bench.[475] With Attorney General Cummings on vacation in Florida, Assistant Attorney General Robert Jackson (later to become Justice Jackson) convinced President Roosevelt that passing the reform legislation because of the Justices' ages was disingenuous and created suspicions in the public mind.[476]

On March 9, 1937, President Roosevelt took his case for the court-packing plan to the public.[477] In one of his famous "fireside chats," he outlined the issue, the stakes and his solution.[478] Certain portions of his speech are worth reprinting here:

> The Courts, however, have cast doubts on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern social and economic conditions.

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466 *Id.*
467 *Id.*
468 REHNQUIST, *supra* note 56, at 120.
469 *Id.* at 121.
470 *Id.*
471 *Id.* at 123.
472 *Id.* at 125.
473 Ross, *supra* note 427, at 1215.
474 Friedman, *supra* note 416, at 1028.
475 REHNQUIST, *supra* note 56, at 125.
476 *Id.*
477 President Franklin D. Roosevelt, Fireside Chat 9: On "Court-Packing" (Mar. 9, 1937), *available at* http://millercenter.org/scripps/archive/speeches/detail/3309.
478 *Id.*

We are at a crisis in our ability to proceed with that protection. . . .

. . . .

I want to talk with you very simply about the need for present action in this crisis–the need to meet the unanswered challenge of one-third of a Nation ill-nourished, ill-clad, ill-housed.

Last Thursday I described the American form of Government as a three horse team provided by the Constitution to the American people so that their field might be plowed. The three horses are, of course, the three branches of government–the Congress, the Executive and the Courts. Two of the horses are pulling in unison today; the third is not. Those who have intimated that the President of the United States is trying to drive that team, overlook the simple fact that the President, as Chief Executive, is himself one of the three horses.

It is the American people themselves who are in the driver's seat.

It is the American people themselves who want the furrow plowed.

It is the American people themselves who expect the third horse to pull in unison with the other two.

. . . .

In the last four years the sound rule of giving statutes the benefit of all reasonable doubt has been cast aside. The Court has been acting not as a judicial body, but as a policy-making body.

When the Congress has sought to stabilize national agriculture, to improve the conditions of labor, to safeguard business against unfair competition, to protect our national resources, and in many other ways, to serve our clearly national needs, the majority of the Court has been assuming the power to pass on the wisdom of these acts of the Congress–and to approve or disapprove the public policy written into these laws.

. . . .

The Court in addition to the proper use of its judicial functions has improperly set itself up as a third house of the Congress–a super-legislature, as one of the justices has called it–reading into the Constitution words and implications which are not there, and which were never intended to be there.

. . . .

. . . . We want a Supreme Court which will do justice under the Constitution–not over it. In our courts we want a government of laws and not of men.

. . . .

When I commenced to review the situation with the problem squarely before me, I came by a process of elimination to the conclusion that, short of amendments, the only method which was clearly constitutional, and would at the same time carry out other much needed reforms, was to infuse new blood into all our Courts. We must have men worthy and equipped to carry out impartial justice. But, at the same time, we must have Judges who will bring to the Courts a present-day sense of the Constitution–Judges who will retain in the Courts the judicial functions of a court, and reject the legislative powers which the courts have today assumed.

. . . .

If by that phrase "packing the Court" it is charged that I wish to place on the bench spineless puppets who would disregard the law and would decide specific cases as I wished them to be decided, I make this answer: that no President fit for his office would appoint, and no Senate of honorable men fit for their office would confirm, that kind of appointees to the Supreme Court.

But if by that phrase the charge is made that I would appoint and the Senate would confirm Justices worthy to sit beside present members of the Court who understand those modern conditions, that I will appoint Justices who will not under-

> take to override the judgment of the Congress on legislative policy, that I will appoint Justices who will act as Justices and not as legislators–if the appointment of such Justices can be called "packing the Courts," then I say that I and with me the vast majority of the American people favor doing just that thing–now.[479]

E. Committee Hearings

The Senate Judiciary Committee hearings began in March 1937.[480] The administration took two weeks to call its witnesses.[481] Assistant Attorney General Jackson gave a "spirited and articulate defense" of the bill based on the idea that the Court had an outdated view of interpreting the Constitution and was "denying the people the right to govern themselves."[482]

Senator Burton Wheeler, taking the lead in opposition to the bill, decided to attack the bill directly by attacking the initial premise President Roosevelt had based the bill upon: the Court's workload.[483] On March 18, 1937, Senator Wheeler and others called upon Chief Justice Hughes and asked him to appear as a witness to the Court's docket.[484] Chief Justice Hughes demurred, but, in consultation with Justice Brandeis, agreed to furnish a letter to the committee.[485] Chief Justice Hughes had the letter signed by Justices Brandeis and Van Devanter, and when Senator Wheeler came to the Hughes home to pick it up, the Chief Justice handed it to him and said, "[t]he baby is born."[486]

On March 22, 1937, Senator Wheeler told the Senate Judiciary Committee that after Attorney General Cummings testified about the Court's inability to keep up with its own docket, he went

> to the only source in this country that could know exactly what the facts were. . . . And I have here now a letter by the Chief Justice of the Supreme Court, Mr. Charles Evan Hughes, dated March twenty-first, 1937, written by him and approved by Mr. Justice Brandeis and Mr. Justice Van Devanter. Let us see what these gentlemen say about it.[487]

The letter was factual and stated the Court was "fully abreast of its work."[488] The letter continued: "The work of passing upon these applications for certiorari is laborious but the court is able to perform it adequately."[489] Finally, the Chief made this observation:

> An increase in the number of justices of the Supreme Court, apart from any question of policy, which I do not discuss, would not promote the efficiency of the court. It is believed that it would impair that efficiency so long as the court acts as a unit. There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to deride.

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479 *Id.*
480 REHNQUIST, *supra* note 56, at 125.
481 *Id.* at 126.
482 *Id.*
483 *Id.*
484 *Id.*
485 Rauh, *supra* note 428, at 217.
486 REHNQUIST, *supra* note 56, at 127.
487 *Id.* at 127-28.
488 Letter from Chief Justice Charles E. Hughes to Senator Wheeler (Mar. 22, 1937), *available at* http://newdeal.feri.org/court/hughes.htm.
489 *Id.*

> . . . .
> . . . The present number of justices is thought to be large enough so far as the prompt, adequate and efficient conduct of the work of the court is concerned.[490]

The letter had the effect of a "bombshell in the debate over the Court-packing plan."[491] Although the letter only dealt with the first set of arguments the administration provided for justifying the reorganization, it "necessarily made the public suspicious of the second set."[492]

F. The Switch in Time

Less than two weeks after the Hughes letter was read to the committee, on March 29 the Court handed down *West Coast Hotel Co. v. Parrish*, upholding the minimum-wage law in Washington state.[493] Two weeks after that, the Court handed down a key case, *NLRB v. Jones & Laughlin Steel Corp.*, in which it upheld the constitutionality of the National Labor Relations Act, commonly known as the Wagner Act.[494] These decisions, together with arguments advanced by the plan's opponents, turned the tide of public opinion against the plan. The thrust of the arguments were that the Supreme Court's ability to defend civil rights would be compromised if the Court was too beholden to political appointments, that the plan would undermine judicial independence, and that the plan would give President Roosevelt dictatorial powers.[495] With Justice Van Devanter retiring a month later, the Court was finally in President Roosevelt's favor.[496]

The final nail in the coffin appeared to come when the Senate Judiciary Committee released its report.[497] The scathing report accused President Roosevelt of punishing the Justices and described the court-packing plan as an "invasion of judicial power such as has never before been attempted in this country."[498] The last paragraph of the report concluded: "It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America."[499] "Thirty thousand [copies of the report] were sold to the public in less than a month" and an additional seventy thousand were sent to Congressmen for free distribution.[500]

"[A]t this point, when his fortunes had sunk to their lowest, Roosevelt brought about an astonishing recovery that breathed new life into the apparently [dead] idea of Court packing."[501] On June 16, the President invited 407 "surprised" Democratic Congressmen to a picnic with him on June 25 on Jef-

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490 *Id.*
491 REHNQUIST, *supra* note 56, at 128.
492 *Id.*
493 W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 399-400 (1937).
494 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937).
495 Friedman, *supra* note 416, at 1038.
496 *Id.* at 1028-29.
497 S. REP. NO. 75-711 (1937).
498 *Id.* at 11.
499 *Id.* at 23.
500 William E. Leuchtenburg, *FDR's Court-Packing Plan: A Second Life, A Second Death*, 1985 DUKE L.J. 673, 675-76 (1985).
501 *Id.* at 677.

ferson Island, near Annapolis.[502] After a successful weekend, he sprang the Congressmen with a surprise bill that would revive court-packing, but in compromised manner. His new bill would permit him "to appoint one additional Justice per calendar year for each member [over seventy-five years old]."[503] If passed, the bill would allow him to permit three new Justices–one for 1937, another for 1938, and a third to replace Justice Van Devanter.[504] Passage of the bill would take a fair bit of political maneuvering, especially by President Roosevelt's close ally in the Senate, Joe Robinson.[505] Serving as majority leader, he extracted the votes he needed so he could inform President Roosevelt he had the votes he needed for passage.[506]

In July, Washington was gripped by a heat wave, prompting one writer to complain:

> I have sweated through the Red Sea with a following wind and a sky like burnished steel. I have sweated through steamy tropical forests and across acrid burning deserts, but never yet, in any equatorial hell, have I sweated as I sweated in Washington. . . The city felt as though it were dying. There was no breeze, no air, not even much sun. Just a dull haze of breathless discomfort through which the noble buildings could be discerned, gasping like nude old gentlemen in a steam room. The pavement felt like grey nougat and the least exertion soaked one to the skin.[507]

In the midst of this heat, Senator Robinson, overweight and with a heart condition, died in his apartment.[508]

"A special funeral train left Washington for Little Rock on July 17[, 1937,] carrying thirty-eight members of the Senate . . . and Vice President John Nance Garner."[509] On the return trip, Vice President Garner spoke to most of the Senators.[510] When he returned, President Roosevelt "asked how he had found the Court situation."[511] Garner replied, "[d]o you want it with the bark on or off, Cap'n?"[512] "Roosevelt replied: "The rough way."[513] "All right . . . You are beat, you haven't got the votes."[514] Roosevelt's court-packing plan was finally dead.[515]

On October 1937, Assistant Attorney General Jackson delivered a speech in which he argued "'[e]ither democracy must surrender to the judges or the judges must yield to democracy.'"[516] Despite Assistant Attorney General Jackson's prediction, democracy survived without much need for yielding of the sort Jackson was espousing on behalf of President Roosevelt. During his

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[502] *Id.* at 677-78.
[503] *Id.* at 680.
[504] *Id.*
[505] *Id.*
[506] *Id.* at 680-81.
[507] *Id.* at 683 (quoting N. COWARD, PRESENT INDICATIVE 219-20 (1937)).
[508] *Id.* at 685.
[509] REHNQUIST, *supra* note 56, at 131.
[510] *Id.*
[511] *Id.*
[512] *Id.*
[513] *Id.*
[514] *Id.* at 132.
[515] *Id.*
[516] Friedman, supra note 416, at 1000 (quoting *Jackson Call Court Curb on Democracy; Says Law Reviews Block United Functioning*, N.Y. TIMES, Oct. 13, 1937, at 6).

second term, Roosevelt nominated five Justices.[517] During his entire tenure, Roosevelt appointed eight Associate Justices and one Chief Justice.[518] By 1941, all but one of the Justices was a Roosevelt appointee. *Life Magazine*'s 1945 article on the Court was called "*The Nine Young Men*."[519]

G. Recent Scholarship–Did the Court Cower to Save Itself?

Conventional wisdom tells the story that Justice Roberts' change of heart, leading him to join the liberals in upholding the Wagner Act and Washington's minimum wage law barely a year after he had voted the opposite, was the result of Roosevelt's court-packing plan. Recently, a new debate has ignited among scholars about what really caused the Court to reverse itself and end the *Lochner v. New York*[520] era. They agree the switch occurred, but disagree as to the reasons why.[521] Scholars agree that votes in the minimum wage case had been cast several days before President Roosevelt's announcement.[522] Professor Joseph Rauh concludes Justice Roberts switched not because of the court-packing plan, but because of the landslide election in 1936.[523] Professor William Ross thinks the Court's decisions in 1936 and 1937 demonstrated an important change in the Court's thinking about the commerce clause and predicted the outcome in *Parrish* and *NLRB*.[524] Others have suggested the switch occurred because of labor strife in the country, particularly the sit-down strikes, rather than the court-packing plan.[525] Professor Michael Ariens suggests that Justice Felix Frankfurter's role during the crisis made the difference, not Justice Roberts' switch.[526]

Regardless of the reasons for the Court's switch, however, two things appear clear from this episode of the Court's history. First, the American public has little appetite for constitutional changes to the structure of American government, even when spearheaded by an exceedingly popular President and a meek Congress. Second, the Court does not, and never has, operated in a vacuum in which contaminants unrelated to the law are immediately expunged. The messy forces brought to bear in American representative democracy can sometimes exert unbearable pressure on the Third Branch, in addition to the first two, and it is precisely in those times that the Court must be at its zenith in

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[517] The Supreme Court Historical Society, *supra* note 418.
[518] Friedman, *supra* note 416, at 1046.
[519] *Id.*
[520] Lochner v. New York, 198 U.S. 45 (1905).
[521] *See* Friedman, *supra* note 416, at 1057. *See also* Alan Brinkley, *The Debate Over the Constitutional Revolution of 1937*, 110 AM. HIST. REV. 1046 (2005); Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L.J. 2165, 2166 (1999) (providing an overview of the debate among modern legal scholars over the explanation for the Court's switch).
[522] Laura Kalman, *The Constitution, the Supreme Court, and the New Deal*, 110 AM. HIST. REV. 1052 (2005).
[523] Rauh, *supra* note 428, at 217.
[524] *See generally* Ross, *supra* note 427, at 1153 n.1.
[525] See Drew D. Hansen, *The Sit-Down Strikes and the Switch in Time*, 46 WAYNE L. REV. 49 (2000).
[526] Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 621 (1994). *See also* Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 258 (1994) (arguing that the internal "dimensions and subtleties of the Justices' jurisprudential postures" explains the Court's switch).

terms of power and its nadir in terms of partisanship. Absent reforms, however, the judicial appointment process will continue its trend toward increased politicization, and ultimately, the republic suffers.

VI. SUGGESTED REFORM

Some commentators have argued that judicial independence must come with some level of judicial accountability.[527] Unaccountability leads to great frustration, which in turn feeds the symptoms described in this Article. Accountability, however, may not be a workable solution and poses serious constitutional problems. Invariably, judicial *accountability* seeks to empirically measure, through the collection of data, judicial decision-making. Decisions would be collected, categorized, scored, statistically regressed, and sliced and diced to demonstrate the judges' accountability or lack thereof. The Constitution contemplates no such check or balance, nor does it clearly state if executive or legislative branches should assume this function. Another possible structural reform is to place limitations on judges' recusal obligations and authority.[528] An interesting suggestion for reform, by a former federal law clerk, is for the Supreme Court to adopt an internal rule requiring a two-thirds majority to declare any act of Congress unconstitutional.[529] Some have called upon the bar to step up and defend the judiciary,[530] both as judges and the institution itself.[531] Other commentators have suggested constitutional amendments to subject Supreme Court Justices to term limits[532] or retention elections.[533] Professor Friedman suggests that in spite of the seriousness of the problem, any solution is more troublesome than the problem itself.[534] However, taking a few steps can help to reduce partisan attacks on judges and thus increase judicial independence.

The most obvious of these steps is to remove the political element from the appointment of judges. Professor Emery Lee points out, persuasively, "that the Framers of the Constitution did not intend for ideology to play a role in the

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[527] *See, e.g.*, Posting of Robert Justin Lipkin to RATIO JURIS blog, http://ratiojuris.blogspot.com/2007/02/judicial-independence-v-judicial.html (Feb. 9, 2007, 13:25 EST).

[528] *See* Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 643-45 (1987).

[529] *See* Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 1010-11 (2003).

[530] *See* Anthony Lewis, *Fifty-Second Cardozo Memorial Lecture: Why the Courts*, 22 CARDOZO L. REV. 133, 149 (2000).

[531] *See* Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 340 (1999) (pointing out the importance of recognizing judicial independence protects both individual judges and the judiciary).

[532] *See, e.g.*, Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 876 (2006).

[533] *See* Dennis B. Wilson, *Electing Federal Judges and Justices: Should the Supra-Legislators be Accountable to the Voters?*, 39 CREIGHTON L. REV. 695, 737 (2006).

[534] Barry Friedman, *"Things Forgotten" in the Debate over Judicial Independence*, 14 GA. ST. U. L. REV. 737, 766 (1998). *See also* Barry Friedman, *Attacks on Judges: Why They Fail*, 13 ME. B.J. 124, 129 (1998) (arguing that the current system works and no reforms are necessary).

Senate confirmation process."[535] Professor Charles Geyh observes that the use of impeachment, jurisdiction and court-packing are no longer viable means of controlling courts, and that efforts to improve the appointments process have become "increasingly viable."[536] Judges are attacked because they are seen as political operatives. Indeed, analyses of President Bush's judicial appointments reveal that for political conservatives, his "judicial appointments may be his greatest accomplishment."[537] If judges are trusted by the American public as truly non-partisan and unbiased, then the oxygen that feeds much (but admittedly, not all) of the flames of passion in attacking judges will asphyxiate. Many states have already learned this lesson and have adopted some variant of the so-called "Missouri plan," providing for nonpartisan selection of judges by independent commissions.[538]

One possible model to consider is the British model, which was substantially revamped in 2005. Prior to 1993, British judges were appointed in a purely political process. The Home Affairs Committee described it as a "closed system of selection by peers and supervisors which is free from scrutiny and largely free from challenge or redress."[539] In 1993, then Lord Chancellor Lord McKay of Clashfern announced specific competitions for judicial vacancies, including open advertising, specific job descriptions, and consultations on candidates.[540] In 2001, partly as a result of a study to consider whether safeguards against discrimination on the basis of race or sex were sufficient in selection procedures for judges, the Commission for Judicial Appointments was created.[541] This entity did not select judges, but instead served to mediate for disappointed candidates and groups, and to monitor the Lord Chancellor's procedures for selection and to make improvements to the process.[542] As a result of the Commission's work and recommendations, the "tap on the shoulder" by the Lord Chancellor, which thereto had been the exclusive method of becoming a judge, was supplemented by a genuine application process.[543] Formal feedback was provided to unsuccessful candidates, and research was

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[535] Emery G. Lee III, The Federalist *in an Age of Faction: Rethinking Federalist No. 76 on the Senate's Role in the Judicial Confirmation Process*, 30 OHIO N.U. L. REV. 235, 265 (2004).

[536] Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153, 220-21 (2003).

[537] Sheldon Goldman, Elliot Slotnick, Gerard Gryski & Sara Schiavoni, *Picking Judges in a Time of Turmoil*, 90 JUDICATURE 252, 283 (2007), *available at* http://www.als.org/ajs/publications/Judicature_PDFs/906/Goldman_906.pdf.

[538] *See* Am. Judicature Soc'y, Judicial Selection in the States: Appellate and General Jurisdiction Courts (2007), *available at* http://www.ajs.org/selection/docs/Judicial%20Selection%20Charts.pdf.

[539] Baroness Usha Prashar, Guest Lecturer, Middle Temple, Judicial Appointments: A Quiet Revolution (Nov. 6, 2006) (transcript *available at* http://www.judicialappointments.gov.uk/docs/Middle_Temple_Guest_Lecture.pdf).

[540] *Id.*

[541] *Id.*

[542] *Id.*

[543] *Id.*

initiated to learn why women and ethnic minority lawyers were not applying for judgeships.[544]

In 2003, Lord Falconer, the current Lord Chancellor, pointed out that since the judiciary is "often involved in adjudicating on the lawfulness of the actions of the Executive," judicial appointments should be independent of the government.[545] This central tenet was incorporated into Britain's Constitutional Reform Act, which came into effect in April 2006.[546]

The Act is a wholesale restructuring of the judiciary in Great Britain, including changing the role of the Lord Chancellor and creating a new Supreme Court.[547] Most relevant to this discussion, however, are provisions that affect judicial independence and appointment. According to the Act, all government ministers have a statutory duty to uphold the independence of the judiciary and not try to influence them.[548] The Lord Chancellor assumes a statutory mandate to protect judges' independence.[549] The Act demands that the only criterion for judicial appointment is merit,[550] with attention being paid to the "need to encourage diversity in the range of persons available for selection for appointments."[551]

Judicial selection is now vested exclusively in the Judicial Appointments Commission, an "independent, openly appointed and accountable body."[552] There are fifteen commissioners, including judicial, legal and non-legal professionals, all selected through open competition.[553] The role of the Commission is to select and recommend, while the Lord Chancellor appoints.[554] He can reject the recommendation, providing reasons to the Commission, but he is not allowed to select an alternative candidate.[555] In defining merit, the Judicial Appointments Commission looks for core qualities and abilities, such as intellectual capacity, integrity and independence, ability to treat others with respect and sensitivity, authority and communication skills, and leadership and management skills.[556]

Britain's experiment with judicial selection is remarkable on many levels. First, it legislates a duty for all stakeholders in the administration of justice to defend the independence of the judiciary.[557] If a similar law were to be enacted in the United States, it would have to be carefully crafted to permit criticism of

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544 *Id.*
545 *Id.*
546 Constitutional Reform Act, 2005, c.4, § 3 (Eng.), *available at* http://www.opsi.gov.uk/acts/acts2005/20050004.htm; Prashar *supra* note 539.
547 Constitutional Reform Act, 2005, c.4, § 3 (Eng.), *available at* http://www.opsi.gov.uk/acts/acts2005/20050004.htm
548 Constitutional Reform Act, 2005, *supra* note 546, § 3(5) (stating that the Lord Chancellor and other Ministers of the Crown "must not seek to influence particular judicial decisions through any special access to the judiciary").
549 *Id.* § 3(1).
550 *Id.* § 63(2).
551 *Id.* § 64(1).
552 Prashar, *supra* note 539.
553 *Id.*
554 *Id.*
555 *Id.*
556 *Id.*
557 *Id.*

the judiciary under the First Amendment while still charging politicians to uphold the independence of the judiciary, just as they are required to uphold the Constitution. Presumably, such a law would give lawmakers pause before they attacked individual judges for individual decisions made on the bench. Second, the British experiment turns judicial selection on its head by making the process completely transparent and merit-based. The experiment is too young to be judged, but the British public have accused the Judicial Appointments Commission of working too slowly, leading to many vacancies in judgeships.[558] Nonetheless, having a lack of judges because a deliberative non-partisan body is being careful in selecting judges in a transparent manner based on merit alone may not be as bad as having a lack of judges because two political parties are at odds as to whether a judge candidate is too liberal or too conservative.

The time has come in this country to consider wholesale reforms in our judicial appointments process. The lessons of Chase's impeachment, *McCardle*, and the court-packing plan are doomed to be lost in the hyper-partisan environment Washington finds itself in unless the political element of judicial appointment is reduced substantially. While the Constitution vests judicial appointment authority to the President with the advice and consent of the Senate, it is silent on the mechanics of this appointment authority. Our republic demands that we explore the flexibility inherent in the Constitutional appointment scheme to drive transparency and merit into this process.

VII. CONCLUSION

Whether the attacks on the judiciary come from impeachment, jurisdiction-stripping, court-packing, or simply unbridled attacks on judicial decision-making, they are symptomatic of a deeply held frustration born out of a sense that, in the words of retired Justice O'Connor, the law "shouldn't change just because the faces on the court have changed."[559] Such frustration is to be expected, perhaps even welcomed, in what Justice Breyer calls the "clamor" of a representative democracy, but too often, the symptoms rise to the level of unwarranted and unhelpful attacks when citizens lose faith in the impartiality of the judiciary.[560] When judges are seen as partisan and results-oriented, or when judges are appointed purely because of their prior relationship with the executive branch, confidence in the constitutional scheme suffers. Although charges of partisan judicial decision-making are nothing new, several important differences have shaped American society in recent years that ensure unhappiness with the judiciary's perceived neutrality will continue. Critically, the rising influence of grassroots organizations, mobilizing instant technology to rally tens of thousands at once on a specific judicial nomination, will surely ensure that the judiciary will continue to be regarded with some level of suspicion. To

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[558] *See* Frances Gibb, *Ministers are Blamed for Shortage of Judges*, TIMES (London), Sept. 10, 2007, at 4. *See also JAC Appoints its First High Court Judges*, LAWYER, Sept. 10, 2007, at 5.

[559] *FOX News Sunday: Interview with Sandra Day O'Connor* (FOX television broadcast May 20, 2007) (transcript on file with author).

[560] *See* Ken Kersch, *Justice Breyer's Mandarin Liberty*, 73 U. CHI. L. REV. 759, 801 (2006).

preserve the constitutional scheme and protect judges with the independence they need to do their jobs, we should begin an earnest and honest conversation about the manner in which federal judges are selected, beginning first and foremost that the selection must be made on merit and merit alone.