

“REAL JUDGES”

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My father was a lawyer in Illinois and for sixteen years was an elected judge on the county court, a court of limited jurisdiction. He refused to let the party bosses encroach on his judicial duties, which administratively included the naming of persons to a number of non-judicial bodies of great patronage interest. These included the Airport Authority, the Election Commission, the Juvenile Delinquency Center, and others. The public, however, appreciated my father, even if the political bosses did not. The public demonstrated its appreciation by carrying him through four primaries and four general elections; then my father retired and joined me in private practice. My father aspired to the state circuit court, a higher court of general jurisdiction, but knew he had little chance. The candidates for that court were not elected, but instead were chosen by political caucuses dominated by the bosses.¹

As a county judge, my father became widely known for his leadership in the handling of juvenile problems. I should quickly add that I do not believe that I gave him any reason to become a juvenile delinquency expert. Because he became so well-known for his juvenile work, a national magazine, *McCall's*, sent a writer to do a story about him.² This is what the author wrote about the visit to the courthouse by a family with a young son in trouble:

The Court House sits squarely in the middle of Springfield. It is the most impressive building in the town, because Abraham Lincoln practiced law there, right in those same four walls, those same dusty, old courtrooms. But this was the first time they had been inside. They felt embarrassed and uncertain as they went up the white marble staircase and asked for Judge Wood's office.

Judge Harlington Wood. Whatever ill winds blew upon George Green and his family in that summer of last year, they

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1. For a discussion of that system, see Russell N. Sullivan, *Constitutional and Statutory Bases of Illinois Courts*, 1952 U. ILL. L.F. 463, 473–75 (1952). Further, in another article in that same volume, the author comments that circuit court “judges are generally selected by those who happen to control party organizations and machinery and thereby control judicial conventions and their delegates.” Edward B. Love, *Judicial Selection and Tenure*, 1952 U. ILL. L.F. 542, 545 (1952).

2. Morris Markey, *The Mistake*, *McCall's*, Oct. 1948, at 30.

brought one thing of inestimable good. Harlington Wood was created to be a judge of men. From the day he left the plow at his father's upstate farm and went off to the law school, he was moving toward the place in life that was exactly right for him.³

I don't remember my father ever mentioning "judicial independence." He likely never thought of his own independence in those terms. Later I came to appreciate that it really was judicial independence. The political bosses could not deny my father his legacy of helping the younger generations. Judicial independence has many different facets that are not always appreciated.

"Judicial independence" is a concept that needs to be better understood, not just by judges, but also by the other two branches of government and the general public. You may think nothing more need be said about this subject because there is a great wealth of material already written by scholars, judges, political leaders, and others. This essay consists mainly of personal observations on the subject by a longtime participant in our judicial process.

The phrase "judicial independence" is one we often use with great reverence because we consider it to be the heart of our judicial system. In recent times political debate has enlivened the subject, so I will comment on some of the new developments.

But first, it could be helpful to understand what judicial independence is *not*. For example, by judicial independence we do not mean that judges are free to do as they please without regard to the law or the facts in order to achieve a personally-preferred result; that judges do not have to work except when they feel like it; that judges can set aside a jury verdict because the judges, if they had been on the jury, would have held the other way; that judges can be rude, uncivil, or inattentive to lawyers, parties, witnesses, or other judges; that judges may consult other people, including government officials, political leaders, or friends, about what should be done in a case; that judges can sentence a guilty defendant to prison for a longer term because the judges are prejudiced against the defendant's race or because of some other bias; that judges cannot be disciplined for the judges' own misdeeds, in or out of court; that judges may pull the courthouse blinds down and conduct their judicial activities hidden from public view—for instance, by sealing politically sensitive documents without sufficient legal justification; that judges are free to decide cases just to please the press or the public, or to satisfy their own political philosophy; that judges may disregard or judicially amend a statute because they think they have

3. *Id.* at 122.

a better solution; that judges are free to use their office inappropriately to try to get promoted to a higher office, or for any other political or personal benefit; that judges may issue policy or advisory statements in violation of the constitutional limitation of deciding only actual cases and controversies; or that judges can make up special rules without good reason, disregarding established due process procedures. Although federal judges have no constituency from which to solicit campaign funds, neither are judges free to accept gifts, vacations, or other favors from those with an interest in litigation. You can see from just these few random samples what judicial independence is not. Judicial independence, to the contrary, imposes limitations on judges.

When you become a federal judge you take a simple but meaningful oath of office. By that oath, you “do solemnly swear . . . that [you] will administer justice without respect to persons, and do equal right to the poor and to the rich, and that [you] will faithfully and impartially discharge and perform all the duties incumbent upon [you] as [a federal judge] under the Constitution and laws of the United States. So help [you] God.”⁴ State judges take similar oaths. That oath is no mere formality. To judges in an independent judiciary, be it federal or state, the oath serves as a succinct reminder of what judges are obligated to do. It might be useful for judges each time they ascend the bench to recall their oath. It means that judges are not only free to render impartial justice according to law, but that they must do so, letting any chips—political, personal, or otherwise—fall where they may.

I.

THE FOUNDATION OF JUDICIAL INDEPENDENCE

Our founding fathers wisely laid the basic foundation for our independent federal judiciary. It was provided for in its own separate article of the Constitution, Article III. The judiciary is a coequal branch of government, though not always so regarded. The other two branches of government, executive and legislative, have their own share of independence, but all three branches of government have limitations and are subject to certain constitutional “checks and balances.” For instance, the President nominates federal judges, but those nominees may take judicial office only after being confirmed by the Senate. It is the executive branch that enforces judicial judgments, and it is Congress which must provide judicial resources. In turn, it is the federal judiciary that can hold

4. 28 U.S.C. § 453 (1994).

unconstitutional an act of Congress or a directive of the President. The three branches, with different responsibilities and with various political persuasions, working in as harmonious a relationship as possible, are what provide our functioning democratic government.

It is established by the Constitution that once a federal judge takes office he holds that office "during good Behaviour,"⁵ which ordinarily means for life. Even the President, who nominated the judge, is not free to fire the judge, even when he becomes displeased with his judicial choice. Judicial decisions may be reviewed and reversed only by the judiciary, not by non-judicial authorities, although all persons are free to say what they please about the courts' opinions. Federal judges can be removed from office only by impeachment. Impeachment is constitutionally reserved for serious misconduct believed to make judges personally unfit to further serve as judges of other people. The Constitution provides that the House of Representatives shall have the sole power of impeachment;⁶ that is, the power to return a charge of wrongdoing against a federal judge on which the judge must stand trial. This procedure is similar to a grand jury indictment in an ordinary criminal case. The Constitution further provides that only the Senate, not any court, shall have the power to try the impeachment to determine the judge's guilt or innocence.⁷ If the judge is found guilty by trial in the Senate, the judge has no choice but to hang up the robe.⁸ Impeachment is the only criminal-type trial in which there is no provision for a jury or an appeal.⁹ The members of the Senate are for practical purposes both judge and jury. Therefore, in some ways, one hundred senators sitting in judgment are our biggest court and jury.

Short of impeachment, however, judges may be subject to certain other disciplinary measures for less serious misconduct.¹⁰ Some of those who lose their court cases erroneously think that making a formal complaint about the judge is a type of appeal, or a

5. U.S. CONST. art. III, § 1.

6. *Id.* art. I, § 2, cl. 5.

7. *Id.* art. I, § 3, cl. 6.

8. *Id.* art. I, § 3, cl. 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States . . .").

9. A finding of guilt by the Senate, however, does not foreclose further criminal prosecution. *Id.* ("[T]he Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."). The Constitutional "double jeopardy" protection does not apply.

10. 28 U.S.C. § 372 (1994) (providing provisions and procedures for judicial discipline).

way of getting even with the judge. Some complaints may be meritorious. After a fair hearing before other Article III judicial peers, judges may receive, for example, a public or private reprimand.¹¹ To guide judges' conduct, the Judicial Conference maintains a code of judicial ethics, as well as a committee of federal judges to which judges may make personal inquiry if in some doubt about what might be appropriate conduct. It is well understood, for instance, that federal judges may not engage in any political activities or solicit funds for any purpose even for their church or favorite charity. These and other appropriate restrictions on judges add to the validity of judicial independence. Judicial independence, to some extent, depends on restrictions on judges' personal independence to help keep the conduct of judges above reproach. Considering all the restrictions, some have said that federal judges themselves have fewer rights than those citizens whose rights the judges strive to protect.

Since the federal judges are protected from unjustified removal, is it nevertheless possible to discipline judges by cutting their salary, even if for only a short period? No, it is not. The Constitution provides that a federal judge's salary may not be reduced during the judge's tenure.¹² Congress can, however, increase the salaries of federal judges to keep up with the general level of legal compensation in the marketplace. Congress can also grant a cost of living increase to keep up with inflation. Most federal employees receive cost of living increases, but some in Congress for their own reasons, including political, have in the past voted “no” on extending this increase to federal judges. Some of us have thought Congress misunderstood and believed the Constitution prohibited not only a reduction in judicial salaries, but also a fair salary in-

11. *Id.* § 372(c)(6). United States District Judge John H. McBryde of the Northern District of Texas challenged the legality and propriety of disciplinary sanctions. *McBryde v. Comm. to Review Circuit Council Conduct and Disability Orders of the Judicial Conf. of the U.S.*, 264 F.3d 52 (D.C. Cir. 2001). Judge McBryde argued that the Constitution shields federal judges from all sanctions short of impeachment and that judicial independence requires this absolute freedom from lesser sanctions. *Id.* at 64–65. The D.C. Circuit, distinguishing intra-branch discipline of federal judges from discipline attempted by either Congress or the executive branch, rejected McBryde's arguments, stating “we see nothing in the Constitution requiring us to view the individual Article III judge as an absolute monarch, restrained only by the risk of appeal, mandamus and like writs, the criminal law, or impeachment itself.” *Id.* at 68. The court noted that “[a]rrogance and bullying by individual judges expose the judicial branch to the citizens' justifiable contempt. The judiciary can only gain from being able to limit the occasions for such contempt.” *Id.* at 66 (citation omitted).

12. U.S. CONST. art. III, § 1.

crease. Often citing the low salaries of federal judges as a reason, sixty Article III judges retired or resigned from the bench between 1991 and 2002, marking it as the largest number of departures in federal judiciary history for any ten-year period.¹³ Indeed, judges often see their law clerks recruited to leading private firms at starting salaries comparable to those of judges.¹⁴

Not only is a reasonable judicial salary fair treatment of judges for their work, but it is also an important factor in judicial independence. A well-paid judge is less susceptible to deserting the bench for the more lucrative private practice or, in the very rarest of circumstances, succumbing to the temptation to do judicial favors for a fee. Judges who have accepted bribes may not only be subject to impeachment as judges, but also find themselves as defendants in front of the bench of another judge and possibly on their way to the penitentiary.¹⁵ Reasonable judicial salaries also serve another very important purpose because fair compensation helps attract the most qualified lawyers to the bench. If serving as a judge were to mean a financial sacrifice impacting prospective judges and their families, only the rich would become federal judges. That should not be. In 2001, Congress did not forget the Third Branch entirely and gave the judges a cost-of-living increase, not a pay raise, for which the judges are grateful. However, since 1993, the judges have received only four of nine annual cost-of-living adjustments.¹⁶

Judges have always been at some personal risk from disgruntled litigants and anti-government groups.¹⁷ For example, an ordi-

13. *Insecure About their Future: Why Some Judges Leave the Bench*, THE THIRD BRANCH (Admin. Office of the U.S. Courts, Office of Public Affairs, Washington, D.C.), Feb. 2002, at 1-4 [hereinafter *Insecure About their Future*].

14. *Id.* at 2; Robert N. Weiner, *Judicial Salaries: Making Less than New Lawyers*, NAT'L L.J., Aug. 27, 2001, at A20.

15. United States District Judge Robert Collins of Louisiana was convicted in federal court in September 1991 of conspiracy, bribery, and obstruction of justice for taking a \$100,000 bribe from a drug smuggler. *House Urged to Impeach Failed Judge*, CHI. TRIB., June 24, 1993, at 8. Collins resigned his judgeship in August 1993 from his prison cell, in the face of impending impeachment. *Judge in Bribery Case Resigns Rather than Face Impeachment*, DALLAS MORNING NEWS, Aug. 7, 1993, at 36A. An unusual story involves former U.S. District Judge Alcee Hastings of Florida, who was impeached on bribery charges in 1988 and removed from office by the Senate the next year. Nick Anderson, *Black Leaders to Protest Tally of Electors*, L.A. TIMES, Jan. 6, 2001, at A13. In 1992, Hastings, who was acquitted of the criminal charges against him, was elected to the House of Representatives where he still serves today. *Id.*

16. *Insecure About their Future*, *supra* note 13, at 2.

17. See, e.g., *United States v. Jordan*, 223 F.3d 676 (7th Cir. 2000) (involving a Puerto Rican terrorist who at one point considered bombing the federal courthouse in Chicago); *United States v. Nichols*, 169 F.3d 1255 (10th Cir. 1999) (prose-

nary-looking letter was delivered to me one February at the office, but its contents were not ordinary. It was a very mean and vicious threat about what would soon happen to me. The sender from the Chicago area got so enthusiastic about sending me his “valentine” that he forgot and conveniently put his name and return address on the envelope. Since we are now in a war with terrorists, the risks are much greater for everyone. Congress has the responsibility to look after the welfare of the judiciary because the judiciary cannot financially care for itself. The judicial structure must be kept healthy and safe, especially in times of national crises, or the terrorists will have achieved some part of their goal.

Federal judges who meet certain age and service requirements and voluntarily choose to become “senior judges” are constitutionally entitled, without further judicial service, to receive full salary for the rest of their lives. That additional salary, however, has already been earned. It is like a pension that most others in non-public pursuits earn during their productive years. Judges, as a result, need not be motivated out of concerns for an uncertain financial future. That future has been provided for, but today many senior federal judges keep on working without any additional compensation out of a sense of duty. Senior judges could fully retire, as do many in private business, and just go home to a rocking chair and “smell the roses.” That rocking chair would likely be a much safer place these days than any federal building. Because of the contributions by working senior judges who have not retired, many judicial emergencies are avoided, our judicial system is kept in operation, and the federal government is saved great additional expense. Currently, senior judges handle twenty percent of the federal caseload. Even with the help of the working senior judges, the active judges in some areas need additional help to take care of the continually increasing caseload. In the past three decades, judges of the United States courts of appeals have seen a nearly two hundred percent increase in their average caseloads, and a federal district judge’s average caseload has increased by over fifty-five percent.¹⁸

cuting Nichols, a co-conspirator of Timothy James McVeigh, for the planning and bombing of the Alfred P. Murrah Federal Building in Oklahoma City); *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998) (appealing capital sentence conviction for the bombing of the Alfred P. Murrah Federal Building in Oklahoma City which resulted in 168 deaths); *United States v. Moody*, 977 F.2d 1425 (11th Cir. 1992) (appealing conviction in the mail-bomb death of United States Circuit Judge Robert Vance).

18. *Insecure About their Future*, *supra* note 13, at 4.

In addition to adequate salaries, the independent judiciary must have adequate resources to function. The judiciary needs funding for offices, staff, training, and equipment. A reasonably impressive courtroom is not a waste of money as appropriate surroundings contribute to the dignity of the law and the respect for those who administer it.

But this emphasis on salary does not mean that salary is the only reward for judicial service. Being judges and rendering impartial and competent judicial service ordinarily brings with it some public prestige and confidence in the system, as well as personal satisfaction to the judges for service rendered for their country. The prestige, public confidence, and judicial independence were inherited from judicial predecessors, but that inheritance must be continually earned and protected. That judicial inheritance must be passed on unblemished to our successor judges of tomorrow.

II. ENSURING JUDICIAL INTEGRITY

In 1992, I participated in a judicial conference at the Russian Legal Academy in Moscow on behalf of our State Department.¹⁹ A few American judicial colleagues and I were informed by our hosts, judges from all across Russia, that being a judge in Russia brought little or no prestige or recognition. Their judicial salaries reflected that low esteem. Hopefully, that may now be changing, but it will take awhile. Fair compensation will help not only Russian judges personally, but their judicial system as well. While at the Moscow Legal Academy, we visited one court in a suburb of Moscow where Dean Lev Khaldeyev of the Academy had previously been a judge. It was a court of eleven judges, the same number of active judges as on my court, but to our surprise every one of those Russian judges was a woman. What surprised us most, however, was the Russian explanation that the low judicial prestige and salary did not attract competent male lawyers to the bench. There is no doubt that a good bench needs a balance of both men and women of competence and integrity.

An independent judiciary with secure tenure is vital, but it also imposes on the appointing authority the corresponding necessity of

19. We were invited and sent to try to impart some new ideas, at least new to the Russians, as to how the Russian judicial system could be improved now that Stalin was buried in Red Square. Without a judiciary of integrity, all Russian reform efforts are doomed to failure. For further discussion of my travels in Russia, see Harlington Wood, Jr., *Last Look*, AM. HERITAGE, April 1999, at 48, 50.

rising above purely party politics, even though politics is a legitimate factor in nominating judges. Only the most competent lawyers and judges should be called to the bench. Life tenure could be very unfortunate if those appointing responsibilities are not adhered to in good faith. The President and the Senate, though immersed in politics, usually have taken that judicial responsibility seriously. As statesmen and stateswomen, and not just politicians, those leaders should not appoint mere political puppets with closed minds. Presidential judicial nominees are carefully examined and voted on in the Senate, but confirmation is sometimes sidetracked for purely political reasons, which only hurts and delays justice. Judicial nominees are subject to intense FBI background checks,²⁰ which the Congress, incidentally, is not.

Formerly, potential judges were also subject to professional evaluation by the American Bar Association (“ABA”) before being nominated by the President. In March 2001, the Bush administration discontinued the use of ABA evaluations prior to nomination after complaints that the ABA itself had become too political.²¹ When I was in the Department of Justice, I considered ABA judicial evaluations to be very helpful. It was a professional evaluation, something top practicing lawyers of the ABA can do better than the FBI. Perhaps the ABA’s judicial procedures and policies did come to need some reforming, but there was no reason for total abandonment. Now I understand the policy has changed. The ABA is back in the evaluation process, but this time not until after the executive branch has made its selection and sent the nominations of federal judicial candidates to the Senate²²— a little late to be of value in making the initial selections, a critical time, but it is a hopeful step. Despite the dispute over the use of the evaluations, Attorney General John Ashcroft received applause during an address to the ABA’s House of Delegates when he stated, “I think we can agree that no political bias should exist” in the nomination and confirmation of judges.²³

If a judge does not have judicial independence, as I have tried to illustrate, that judge is not really a judge, but only another government employee labeled a judge. Bureaucrats are needed to

20. Jonathan Groner, *ABA Presses Ahead on Rating Nominees to the Federal Bench*, N.Y. L.J., Aug. 14, 2001, at 3.

21. Jess Bravin, *Ashcroft Says Bush Judicial Picks Will Show ‘Respect for the Law,’* WALL ST. J., Aug. 8, 2001, at B10.

22. Jerry Crimmins, *Ashcroft Prods ABA to Quickly Vet Judge Nominees*, CHI. DAILY L. BULL., Aug. 7, 2001, at 1.

23. *Id.*

help the government function, but bureaucrats are not needed as judges. "A poor judge is perhaps the most wasteful indulgence of the community. . . . [T]he Bar and the community will support a judge who knowing the range of his discretion and his responsibility will show his mastery of the proceedings before him."²⁴

When a jury is empaneled, it is the jury which is the finder of facts, passing also on the credibility of the witnesses. The judge presides over the trial and instructs the jury on the law to be applied to the facts as the jury finds them in arriving at its verdict. Nearly one hundred years ago, *The Chicago Sunday Tribune*, in commenting on the division of responsibilities between judge and jury, expressed these views:

[J]udicial officers . . . are to some degree influenced by party prejudices, ties of friendship, public sentiment, or ambition; but jurors, not self-nominated, assume a humbler but more independent function. Jurors are summoned from the community at large; . . . have no rivals seeking to unseat them; . . . are actuated alone by a desire to accomplish justice; they assemble today; perform their public service; dispense tomorrow and disappear from the public gaze.²⁵

That jury assessment unfortunately may not always be true today. In some rare instances, there has been reasonable suspicion that perhaps some jurors may have hidden their own prejudices in order to try to affect the jury's verdict. There was a time when lawyers were customarily permitted to directly voir dire prospective jurors, but now many busy trial judges short of time do most, if not all, of the voir dire examination, sometimes only in a perfunctory manner. Trial lawyers questioning prospective jurors and looking jurors in their eyes can better tell whether a certain juror may be a risk so that even if there is no "cause" to excuse the juror, the lawyer may exercise one of a limited number of peremptory challenges.²⁶ We need jurors, judges, and lawyers of integrity and competence working together. I've been around long enough to see not just juries go astray, but also some court conduct that gives the percep-

24. Charles Evans Hughes, *Liberty and Law*, Presidential Address Before the American Bar Association (September 2, 1925), *reprinted in* THE LAWYER'S TREASURY 34 (Eugene C. Gerhart ed., 1956). Hughes was appointed Chief Justice of the United States Supreme Court in 1930.

25. John F. Geeting, *Trial by Jury Must be Preserved*, CHI. SUNDAY TRIB., March 10, 1907, *reprinted in* 69 ALBANY L.J. 134 (1907).

26. Special limitations, however, are placed on the consideration of the race of a potential juror. *Batson v. Kentucky*, 476 U.S. 79 (1986) (forbidding prosecutors from using their peremptory strikes against jurors based solely on their race or on race-based assumptions).

tion, rightly or wrongly, that improper influences may have crept into a judge’s decision that receives little public attention.²⁷

Another important aspect of judicial independence is that judges cannot be sued and made financially liable for any alleged judicial errors it is claimed they may have committed. Judges have absolute immunity from suits arising out of their judicial work.²⁸ Ordinarily, if a judge does get sued under some supposed theory, that immunity quickly disposes of the case. Judges’ time need not be wasted defending against frivolous suits by disgruntled parties. A sore loser in a case has a better remedy than trying to sue the district judge—just appeal—or if it is a decision by a court of appeals, there are rehearing, en banc, and certiorari procedures.

It came as a disappointing surprise to me that there can even be the risk that a judge may lose judicial independence before becoming a judge. On the recommendation of the then United States Senator of my party in Illinois, President Eisenhower nominated me to be United States Attorney in my home district in Springfield, Illinois. After I was confirmed by the Senate and just before I took my oath before the United States District Judge, the judge advised the small assembled group that the ceremony would be brief as I had a lot of work to do.

I soon found out the judge was right. The United States Attorney’s Office received an IRS criminal investigation report about the income taxes of the first assistant to the Republican governor suggesting possible criminal violations in connection with his official duties. That case became part of my initiation. We followed up, using the grand jury to look fully into the allegations. An indictment was returned to which the defendant pleaded “not guilty.” That was big news in the state. I was well aware that there could be some political backlash, but that went with the territory. I knew the defendant to be a political and personal friend of not only the governor and the senator who had recommended me, but the district judge as well. One afternoon a short time before the trial date the judge called me into his chambers and asked me to brief him pri-

27. Alleged politics in the Florida 2000 presidential election case, however, received wide public attention and is discussed in the works of two distinguished scholars with opposing views, Alan M. Dershowitz, and my former distinguished Chief Judge, Richard A. Posner, also a Senior Lecturer at the University of Chicago Law School. Both sides of the issue are ably argued. See ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000* (2001); RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (2001).

28. See *Forrester v. White*, 484 U.S. 219, 225 (1988).

vately on what the government's evidence would be at trial. I politely declined, explaining it would be much better for him to hear it all fresh in court. Shortly thereafter, the defendant unexpectedly came in late one afternoon and entered a plea of guilty. No plea agreement had ever been mentioned. Looking back at it now, it could have been that the defendant did not think he needed one. At the sentencing hearing, as was customary, the judge asked me if there was anything I wanted to say before he pronounced sentence. I began to outline the government's evidence of the crime growing out of the defendant's state service, but the judge cut me off quickly. Then, in relation to what sentence should be imposed, I tried to make some comments on the seriousness of the crime involving a high public official's performance of his duties. The atmosphere was not receptive. My one and only assistant was at counsel table with me. He was a wonderful public servant of my father's vintage. He gave my sleeve a sly tug and whispered, "Harlington, you better sit down and be quiet or you'll be the one going to the penitentiary, and the defendant will be going home." The defendant got a negligible period of probation, as I recall, and that was it. I had not doubted that the judge, if he chose not to voluntarily recuse himself because of the people and politics involved, would live up to his oath, and give both the government and the defendant a fair hearing.

After that hearing, disillusioned, I seriously considered resigning. Soon after that episode, the governor, a friend of the senator who had recommended me, was indicted in federal court in Chicago, also on criminal tax allegations. Incidentally, the senator appeared as a character witness for the governor at the Chicago trial, and the governor was acquitted. When the administration changed, I went back into private practice.

The political backlash I thought might arise from that case turned out only to be delayed. A few years later, shortly after Richard Nixon was elected president, I received a call from Richard Kleindienst, a total stranger to me, but who later became one of my best friends. He explained he was going to be the new Deputy Attorney General under a man named John Mitchell from a prestigious New York firm who would become Attorney General in the new administration. Mr. Kleindienst said he wanted me to come to New York that very night to meet with him as they were quickly putting together the new administration. Intrigued, I went. Mr. Kleindienst interviewed me during dinner at his hotel and offered me the job of Director of the U.S. Attorneys Executive Office, an administrative position looking after the then ninety-three U.S. Attor-

neys and their offices around the country. He had heard of me, it appeared, from a retired FBI executive with whom I had personally worked. I immediately accepted, but then Mr. Kleindienst added, "Of course, you'll have to get the usual political clearance from your Republican senator." So, on the way home I stopped in Washington to see the senator, the same one who had recommended me to be U. S. Attorney. My meeting with the senator in his office in the Senate Office Building was very brief. In no uncertain terms, the senator told me I would never again receive another appointment because "when I had been U.S. Attorney I had not appreciated that I lived in a glass house and had thrown 'rocks' at Republicans." It appeared my possibility of a career with the federal government was over before it had gotten a good start. Dejectedly, I left the senator's private office, but in his reception area I met his administrative assistant. I told him what had just happened. "Oh," he said, "the senator doesn't understand that the new job you have been offered is just a bureaucratic lawyer position in the Department of Justice. He doesn't care about that. He only intends for you not to receive any important appointments, no more presidential appointments." The political clearance then came through, and I moved to Washington and went to work.

If that very influential senator whom I had previously admired had remained on the scene, I would not have become head of the Civil Division in the Department of Justice, a presidential appointment, nor received two other presidential appointments, first to the United States District Court here at home and later to the United States court of appeals in Chicago. Otherwise, I would somehow have had to try to satisfy the senator that I had learned my political lesson and would never again be a political bad boy. From that episode I learned, unfortunately, that living up to your oath of office may not always be what some politicians expect. My judicial independence would have been sacrificed even before I had taken the oath. That incident was very disillusioning about public service, but I expect very rare. I am reminded of it these days when I go to my court of appeals office in the federal building in Chicago named for that senator and pass by a large bronze bust of him in the lobby.

Something similar came up again later after I had moved from the district court to this court. A successor Republican senator, for whom I had the greatest respect, called me one night at home while I was still a district judge, and to my great surprise asked if I would like to take the seat on our court of appeals vacated by Justice John Paul Stevens. I had never given such a remote possibility the slightest thought, but without hesitation I accepted. Later, after my con-

firmation, a former administrative assistant of that senator came to call on me at the federal courthouse. He wanted to discuss some case pending in federal court in Chicago in which he had a personal interest. The senator, I'm positive, knew nothing of this improper approach and would have condemned it in no uncertain terms. I made it plain to his former assistant that he would not be accommodated in any way. The former assistant then in strong and understandable language let me know exactly what he thought about ungrateful people like me who soon forgot the favors done for them by others who had helped the ingrates get their jobs in the first place. Judges have to protect their independence from all angles, but others also need to appreciate the facets of judicial independence.

III.

THE THIRD BRANCH AND MILITARY TRIBUNALS

I witnessed something analogous, but on a much more serious scale, when participating in the surrender ceremony of General Tomoyuki Yamashita at Baguio, Northern Luzon on September 3, 1945. General Yamashita was the commander of the largest Japanese force still in the field at the end of World War II, about 100,000 soldiers who were with him in Northern Luzon along with other Japanese units scattered elsewhere on Luzon. I was present at his surrender as I had been assigned a very minor role. There was no reason for me to have had even a minor role as I had done little or nothing to help win the war. I just happened to be the tallest officer on the staff of the Armed Forces Western Pacific Headquarters in Manila. Apparently, that talent of mine was thought to be useful in impressing upon the Japanese that they had lost the war.

After the surrender I attended General Yamashita's war crimes trial in Manila. The trial result, although not known to me at the time, was foreordained. All five judges on the tribunal were general officers on General MacArthur's staff. Incredibly, not one of those "judges" was a lawyer. The prosecutors were all officers with prosecutorial experience, but none of the officers appointed by the army to serve as General Yamashita's defense team had had any criminal defense experience; however, they did as well under the circumstances as even experienced criminal defense lawyers could have done. The trial rules had been prepared by General MacArthur, including rules governing the admissibility of evidence. Those rules amounted to little more than giving the non-lawyer judges full authority and discretion to admit into evidence whatever they thought might be useful. It is very difficult to cross-examine

on hearsay evidence from sources twice or more removed from the witness. There were numerous other serious and prejudicial irregularities as well. General MacArthur was in a hurry to get a conviction, and he got it. After the Supreme Court considered the case and decided it had no jurisdiction to review that military trial,²⁹ General Yamashita was promptly dispatched by hanging in a prison yard near Manila. Hanging was not considered a very soldierly way for a Japanese general to go, but it was thought to be good enough for him. A firing squad would have been preferred by the general.

In General Yamashita's case, there had not even been the pretense of a fair and impartial trial in those military circumstances. The “judges” from the Executive Branch knew what was expected of them by their commander, and they did it his way. That unfortunate legal event is detailed in two eloquent Supreme Court dissents well worth reading as a matter of American jurisprudence apart from the history of the occasion.³⁰ There was no judicial independence whatsoever, and our system suffered for it. The anti-Japanese emotions of many, understandably strong at the time, were satisfied, but justice was not. It was not an issue of Japanese atrocities, as those were well-known and conceded, but there was no proof General Yamashita personally had had anything to do with those atrocities. He had arrived late on the Philippine scene to try to take charge of the disorganized Japanese army retreating under unrelenting Allied attack.

Recently, an article on the Yamashita trial appeared in *The Miami Herald* newspaper.³¹ The article consists mainly of two interviews, one with a former Army combat cameraman who photographed the trial of General Yamashita and may have photographed the surrender as well.³² I am, although unknown to him, likely to be in some of his photographs. The other interview is with Professor Robert Barr Smith, who was not at the trial, but who after twenty years of military law experience now serves as a law professor at the University of Oklahoma.³³ Both men expressed doubts about the fairness of General Yamashita's trial,³⁴ and I share the same views about that trial.

29. *In re Yamashita*, 327 U.S. 1, 2–3 (1946).

30. See *id.* at 26–41 (Murphy, J., dissenting); *id.* at 41–81 (Rutledge, J., dissenting).

31. Frank Davies, *Plan for Tribunals Recalls WWII Era*, THE MIAMI HERALD, Nov. 23, 2001, at 18A.

32. *Id.*

33. *Id.*

34. *Id.*

But now, because of the terrorists' uncivilized attacks, the use of a military tribunal is again being considered as advocated by Attorney General Ashcroft. When I saw that in the paper several weeks ago I took the liberty of sending copies of the dissents of Justice Rutledge and Justice Murphy from the *Yamashita* case³⁵ to the Attorney General so that neither he nor his staff would overlook the history lessons to be learned. Personally, I believe the use of a military tribunal for today's terrorists is quite proper even in the absence of a declaration of war, but there are some fundamental American criminal justice values set forth in those dissents to guide the planners of future military tribunals so as to avoid the General Yamashita situation. The judges on General Yamashita's commission were not even lawyers, as I mentioned above, but there were numerous other serious deficiencies set out in those dissents. Able military lawyer personnel could be selected without the need for any nonmilitary criminal defense lawyers who might try to use the trial as a stage, which has concerned Attorney General Ashcroft. A compromise with opponents of military tribunals might be useful in this context. The current debate should not center on the use of military tribunals, but on how to adapt a military tribunal to the present purposes without sacrificing fundamental American values. General MacArthur was one of our greatest generals, but he should have left those most serious legal matters to fair-minded military lawyers.³⁶

IV.

STRIKING A BALANCE: INDEPENDENT VERSUS "ACTIVIST" JUDGING

It may be that our own national independence did not get its start on the battlefields of Concord and Bunker Hill, as we have generally believed, but in a courtroom. James Otis was Advocate General of Massachusetts. In good conscience he could not defend, as was his duty, the use of Writs of Assistance in the colonies as authorized by the British Parliament.³⁷ Those writs permitted unlimited and warrantless searches by customs officials of the Royal Government of Massachusetts.³⁸ Otis instead resigned and ap-

35. *Yamashita*, 327 U.S. at 26–41 (Murphy, J., dissenting); *Yamashita*, 327 U.S. at 41–81 (Rutledge, J., dissenting).

36. For the full story of General Yamashita's American defense lawyers' valiant efforts on his behalf, see LAWRENCE TAYLOR, *A TRIAL OF GENERALS: HOMMA, YAMASHITA, MACARTHUR* 141–68 (1981).

37. WILLIAM TUDOR, *THE LIFE OF JAMES OTIS* 56 (1823).

38. DAVID McCULLOUGH, *JOHN ADAMS* 61–62 (2001).

peared in 1761 before the Massachusetts Bay Superior Court in opposition to the writs.³⁹ The five judges of that court, in their scarlet robes, broad hats, and immense wigs, could hardly be considered an independent judiciary any more than could General MacArthur's “judges.” John Adams, who was to become our first vice president and second president, was present in court that day and described the argument of Otis as a “flame of fire.”⁴⁰ Otis, Adams wrote, went beyond merely attacking the writs and launched a broad attack on Crown power over the colonies. In the judgment of Adams, “Then and there the child of independence was born” not on some battlefield.⁴¹ Later, in 1765, when Parliament passed the Stamp Act, Adams wrote that any effort to enforce that law in the colonies must be by jury trial and before “an independent judiciary.”⁴² It is for us to make sure these many years later that no part of our national independence born in that colonial courtroom dies in some other courtroom because later judges have lost their judicial independence.

Charles Evans Hughes, in addressing the American Bar Association while he was its president and before becoming Chief Justice, expressed views worth remembering today:

Some may still entertain the notion that democracy means liberty: that having disposed of dynasties and successfully stormed the citadels of autocracy and privilege, having won the suffrage and denounced political disqualifications, liberty is secured. Undoubtedly the possession of equal political rights is demanded by a people instinct with the love of liberty, and only by such a people can they be maintained, as there is always the danger that the power gained by the exercise of these rights will be used to limit or destroy their exercise by others. Especially should we be on guard against varieties of a false Americanism which professes to maintain American institutions while dethroning American ideals. But the just demands of liberty are not to be satisfied even by a free and uncorrupted right of suffrage. Democracy has its own capacity for tyranny. Some of the most menacing encroachments upon liberty invoke the democratic principle and assert the right of the majority to rule. Shall not the people—that is, the majority—have their heart's desire? There is no gainsaying this in the

39. JOHN R. GALVIN, *THREE MEN OF BOSTON* 24, 27–28 (Brassey's 1997) (1976).

40. LYNN MONTROSS, *THE RELUCTANT REBELS* 20 (1950).

41. McCULLOUGH, *supra* note 38, at 62.

42. *Id.* at 61.

long run, and our only real protection is that it will not be their heart's desire to sweep away our cherished traditions of personal liberty. The interests of liberty are peculiarly those of individuals, and hence of minorities, and freedom is in danger of being slain at her own altars if the passion for uniformity and control of opinion gathers head.⁴³

We are continually reminded that federal judges, after all, are not elected by the people as are the members of the other two branches of government. The judiciary, it is claimed by some, is our only undemocratic branch of government, but it must be remembered that those who select federal judges and those who confirm them are all elected by the people. The Founding Fathers in their amazing wisdom had fully recognized some of the problems that might lie ahead in their new democratic experiment. James Madison wrote, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."⁴⁴

That principle works both ways. The Congress may not encroach on the judiciary beyond its constitutional prerogatives, but on the other hand, it is the function of the judiciary to interpret law, not to legislate so as to encroach on the powers of Congress. It must be recognized, however, that in a practical workable system somebody else in addition to the legislature must have some "law-making powers," though very limited and circumscribed, to carry out the intent of Congress as best as it may be discerned, and that is not always easy. The judiciary is the most qualified to assume this responsibility. Historically those limited judicial legislative powers "have been considered a supplement to, not an invasion of, the legislature's work."⁴⁵ Sometimes it appears that Congress even wants and expects the courts to fill in legislative blanks which they, looking to the future, were uncertain about at the time. Where the borderline may lie between judicial interpretation and judicial legislating cannot always be determined in the many circumstances judges face. Judges should be aware that there is an invisible line which must be approached with caution lest it be overstepped and the courts go tramping on legislative ground.

43. Hughes, *supra* note 24, at 25.

44. THE FEDERALIST NO. 47, at 245-46 (James Madison) (Max Beloff ed., 1948).

45. Albert Tate, Jr., *The Law-Making Function of the Judge*, 28 LA. L. REV. 211, 234 (1968).

Some non-judges, however, apparently are quite sure where that invisible line is. They sometimes draw that line where and when they strongly disagree with some judicial opinion. In the present political climate, if you really want to say something bad about a judge, you brand that judge an “activist,” usually meaning one who allegedly makes law, not merely interprets it. Judges who may be thought by some to be exceeding their legitimate judicial powers, however, are not a new concern. Some judges over the years likely have crossed over that invisible line and become more like legislators than judges. Courts “may not, in all questions of public import or interest, simply enter an order consistent with the feelings of the times.”⁴⁶ “They may no [sic] succumb ‘whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing Constitution.’”⁴⁷ In other words, judges are not to be guided by the latest public opinion polls in making their constitutional rulings. Justice Cardozo argued that interpretation belongs to the court, because “this power of interpretation must be lodged somewhere, and the custom of the constitution has lodged it in the judges.”⁴⁸

While on the Seventh Circuit, I saw some “judicial independence” exhibited by a popular district judge. A prior appellate panel had reversed that district judge and remanded a substantial trust case for the substitution of a different remedy.⁴⁹ The district judge felt very strongly about the case and on remand did not change his original ruling, so the case came back to us.⁵⁰ This time I was on the panel to hear the second appeal and wrote the opinion. All parties were represented by competent counsel. At oral argument the district judge appeared in our court and when the case was called he surprised us when he asked to be heard. Long ago in England, trial judges could appear on appeal to defend their own decisions, but this is not done in the United States. We promptly denied his request and reaffirmed our court’s earlier decision in fairly strong terms. To teach us a lesson the district judge then personally hired a prestigious Washington law firm to petition the Supreme Court on his behalf. The Supreme Court would hear

46. H. E. Widener, Jr., *Some Random Thoughts on Judicial Restraint*, 31 WASH. & LEE L. REV. 505, 519 (1974), reprinted in RUGGERO J. ALDISERT, *THE JUDICIAL PROCESS: READINGS, MATERIALS, AND CASES* 111, 113 (1976).

47. *Id.* (quoting Alexander Hamilton from *THE FEDERALIST* NO. 80).

48. Tate, Jr., *supra* note 45, at 221.

49. *In re Folding Carton Antitrust Litig.*, 744 F.2d 1252, 1255 (7th Cir. 1984) (holding that establishment of research foundation using reserve funds was unnecessary and a “miscarriage of justice and an abuse of discretion”).

50. *Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494 (7th Cir. 1989).

none of it.⁵¹ After that latest defeat the district judge came back home and filed a petition in our court to be allowed his personal legal fees and expenses out of the trust fund surplus, the use of which had been the subject of dispute. That got a short answer. There can be, I found out, just too much judicial independence, in this instance judicial mischief, but we took care of that in-house judicial independence ourselves.

V. CRITICIZING JUDGES

Although I do not believe in all the views expressed by the Baron de Montesquieu, born in 1689, I nevertheless believe in his views that were respected and adopted by our founders. His idea of the separation of powers, with each of three branches of government having limited powers, became the basis for our constitutional structure. His thought was that the division of authority and balance of power was a “weapon against despotic rule by individuals or groups or majorities.”⁵² That warning still remains sound. No viable structural substitute has been offered by our judicial critics. Robust debate among us is good, not bad, and is welcomed in a democracy and can be helpful. Some critics of judicial opinions are not lawyers and may not even have read the offending opinion, voicing their opposition based only on press accounts. Few, if any, of those critics heard the oral arguments in court, read the briefs, or researched the law, and none had the advantage of discussions with other judicial colleagues sitting as a court of appeals panel to hear the case argued. Nevertheless, they are entitled to their say.

Attorney General Ashcroft has spoken out “against judicial activism and against judges who release ‘clearly guilty criminals’ on technicalities” which he says “leads to increased crime.”⁵³ There are various kinds of so-called “technicalities,” but those particular “technicalities” to which Attorney General Ashcroft refers were not identified. It would be very helpful to know in particular to what technicalities the Attorney General may have been referring. That would assist the judiciary in determining what may be done by judges to help with those particular technicalities over which the judiciary may have some control.

51. *See In re Will*, 494 U.S. 1025 (1990) (denying certiorari).

52. ISAIAH BERLIN, *AGAINST THE CURRENT: ESSAYS IN THE HISTORY OF IDEAS* 130 (Henry Hardy ed., 1980).

53. Crimmins, *supra* note 22, at 1.

Some of today's critics who attack the courts for an opinion they find objectionable and brand the author judge an “activist” have themselves advanced a number of remedies.⁵⁴ A few have advocated using congressional impeachment powers if only to intimidate and teach the judges a lesson. If the constitutional requirement of “good behavior” does not cover their particular complaint, some have proposed redefining “good behavior” so that it does, and then they can get rid of offending judges. A most enlightening treatise on the subject of impeachment is Supreme Court Chief Justice William Rehnquist's book, *Grand Inquests*,⁵⁵ which reviews the impeachments of Justice Samuel Chase and President Andrew Johnson, both of which impeachments failed.

One critic, an unsuccessful candidate for the Supreme Court a few years back, advocated that the Constitution be amended to allow court decisions to be overruled by a majority of one house of Congress.⁵⁶ If that ever comes to pass, which I greatly doubt, there could be no stable legal precedents to guide our courts or lawyers. The law would be in perpetual turmoil and subject to change with each congressional election. Special interest groups could lobby the congressional “court” for the result they desired. There may well be other ideas to reel in “activist judges,” but we cannot examine the whole subject here.⁵⁷ Those critics who so quickly and easily brand a judge an “activist” and are willing to sacrifice our constitutional judicial structure for their own political agenda, it seems to me, are the serious “activists.” One of the ways to accomplish their purposes, theoretically, would be to eliminate the lower federal courts altogether, a constitutional power Congress now has. However, I've heard no one suggest that possibility. Congress has and should have the power to limit federal court jurisdiction. Our judicial critics in Congress and elsewhere seem to be sufficiently innovative so as not to need any new ideas from me, but I recently noticed a small article in the *New York Times* that might interest

54. For a thorough discussion of contemporary criticism of the judiciary, see Stephan O. Kline, *Judicial Independence: Rebuffing Congressional Attacks on the Third Branch*, 87 Ky. L.J. 679 (1999).

55. WILLIAM H. REHNQUIST, *GRAND INQUESTS* (1992).

56. Kline, *supra* note 54, at 761 (discussing Robert Bork, President Reagan's unsuccessful Supreme Court nominee). R

57. Judge Ruggero J. Aldisert, now a Senior Judge on the U.S. Court of Appeals for the Third Circuit, is the author of *The Judicial Process Readings, Materials and Cases*, *supra* note 46. This is a great work helpful in understanding the issue we are discussing. R

some congressional critics.⁵⁸ The caption was, "Iran: Lawmakers Sue Judges," and the column continued, "The reformist-led Parliament has filed suit against a number of hard-line judicial officials, including senior judges, for violating the Constitution"⁵⁹ It was the inclusion of "senior judges" in that Iranian lawsuit that got my attention.

VI. CONCLUDING THOUGHTS ON "REAL JUDGES"

Back in 1974, it was recognized that opinion polls were showing a growing, "if not general, uneasiness in the public mind as to a certain lack of restraint on the part of the judiciary."⁶⁰ If there is a lack of judicial restraint in some instance, appeal or new legislation should take care of it. Judges routinely see cases with which they disagree. If the case is in their own circuit, they may dissent or call for an en banc hearing. If in another circuit, they can avoid the case as precedent. When there is a disagreement on the issues, the disagreeing judges do not attack the other judges personally, professionally, or call for them to be removed. To disagree agreeably is better. It need not necessitate some drastic untried remedy. I hear little mention of the hundreds and hundreds of very important and difficult cases decided by judges on a daily basis, but usually only hear about some particular case with which someone strongly disagrees.

No matter how strong judicial criticism may be I hope it does not reach this point. The beloved Judge Alfred Murrah, now deceased and for whom the tragically destroyed courthouse in Oklahoma City was named, told us years ago about a district judge who retained a new bailiff to serve in his court. One duty of the bailiff is to formally open court. The bailiff's usual refrain goes like this: "Hear ye, hear ye, the United States District Court for Oklahoma is now in session, Judge 'so and so' presiding." At that point the district judge enters the courtroom and ascends to the bench. The bailiff is to then conclude with "God save the United States and this honorable court." However, the new bailiff, at the sight of the judge entering the courtroom now full of lawyers, parties, prospective jurors, and onlookers, panicked. From there on

58. World Briefing: Iran, *Lawmakers Sue Judges*, N.Y. TIMES, Aug. 15, 2001, at A12.

59. *Id.*

60. Widener, *supra* note 46, at 112.

he just did the best he could. He concluded with "Here he comes, here he comes. God save us all!"

Foreign judges with whom I have worked, particularly in Russia, have been astounded by our judicial independence and our insulation from politicians and government officials who want to instruct us on how to decide cases. If Russian judges didn't do as they were told, they faced retaliation. Most of the Russian judges learned what was expected of them without actually having to be called on the telephone. Even former Russian President Yeltsin referred to it as "telephone justice." Hopefully, under President Putin that is changing. When our judicial delegation was ready to leave Moscow, the Russian judges, over sixty of them, held a reception for us at the school. They warmly thanked us for coming there to confer and to try to help them as best we could. Some gave us big bear hugs and said "good-bye" with tears in their eyes. They told us that they greatly hoped that some day they, too, would be able to decide their cases based on the facts and the law, not politics, without fear of reprisal. It seems to me that those Russian judges may have a better appreciation of our democratic independent judiciary than do some of our well-intentioned critics here at home. The final refrain of those Russian judges was, "We hope that some day we, too, can be 'real judges' like you are." I hope so too, but ironically, those Russian judges may have to be "activists" themselves to gain and keep their own judicial independence.

Our judicial system, we realize, is not perfect, for "men are not angels," and we continually work to improve it, but even now there is no better judicial system anywhere else in the world.

