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Judicial Independence: A Cornerstone of Liberty: Golden Gate University School of Law Jesse Carter Distinguished Speaker Series

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JUDICIAL INDEPENDENCE: A CORNERSTONE OF LIBERTY

GOLDEN GATE UNIVERSITY
SCHOOL OF LAW
JESSE CARTER DISTINGUISHED SPEAKER
SERIES

CONSTITUTION DAY LECTURE
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MICHAEL TRAYNOR*

INTRODUCTION

Jesse Carter, the seventy-fifth justice of the Supreme Court of California, was born the seventh of eight children, in a log cabin in 1888 in Trinity County, in Carrville, a small depot on the Marysville-Portland stage line.¹ Educated at first by his older siblings and then at the new school house at Coffee

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¹ J. EDWARD JOHNSON, 2 HISTORY OF THE SUPREME COURT JUSTICES OF CALIFORNIA 161 (Bancroft-Whitney Co. 1966), *available at* http://www.ggu.edu/lawlibrary/jesseccarter/biography/attachment/justices_of_california.pdf (last visited Jan. 6, 2007).

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Creek, he later worked in the nearby mines, logging camps, and sawmills, saved up \$300, and came to San Francisco, where he finished school at night while working days at United Railroads.² He graduated from Golden Gate University School of Law, then called the Y.M.C.A. night law school.³ Settling in Redding, he later became District Attorney, a member of the State Bar's first Board of Governors, city attorney for the cities of Redding and Shasta, and state senator in 1939, when Governor Olson proposed him for the Supreme Court of California.⁴

The state constitution then provided, as it does now, that a state legislator cannot be named to any office other than an elective one.⁵ Because justices proposed by the Governor were subject to confirmation not only by the Commission on Judicial Appointments, but also by the electorate on a "yes" or "no" vote at the following election, a constitutional question was raised whether the office was elective or appointive. Showing early promise of his spirit of judicial independence, Carter told the Governor that he would be glad to fight the issue,⁶ which he did in litigation resulting in a unanimous decision of the Supreme Court that the position was elective and that he was eligible.⁷ Carter then was confirmed, served with distinction until his death in 1959,⁸ and authored many dissents and opinions, including the famous majority opinion in *Summers v. Tice*.⁹ Addressing the Lawyers' Club of San Francisco, he said,

I claim the privilege of using language appropriate to the occasion to express my view A decision which is only a mild departure from settled principles should not be dealt with the same as one which outrages justice and lacks even a

² JOHNSON, *supra* note 1, at 162.

³ *Id.*

⁴ *Id.*

⁵ CAL. CONST. art. IV, § 19, *amended by* CAL. CONST. art. IV, § 13. *See also* JOHNSON, *supra* note 1, at 162-63.

⁶ JOHNSON, *supra* note 1, at 163.

⁷ *Carter v. Commission on Qualification of Judicial Appointments*, 93 P.2d 140 (Cal. 1939).

⁸ JOHNSON, *supra* note 1, at 168.

⁹ *Summers v. Tice*, 199 P.2d 1 (Cal. 1948) (holding that where two or more joint tortfeasors are negligent, but only one could have caused the harm to an injured third party, the tortfeasors are jointly and severally liable even absent proof as to which one caused the injury). Justice Carter's opinions may be found at <http://www.ggu.edu/lawlibrary/jessecarter/opinions> (last visited Jan. 6, 2007).

semblance of reason or common sense to support it.¹⁰

Carter's spirit was attended by a love of the outdoors. I have a distant memory of once visiting his ranch in San Anselmo with my family when I was very young and of our friendly, burly, and gracious host.

In an affectionate tribute to him during his lifetime, Chief Justice Gibson spoke of Carter's opinions

as reminiscent of the tall timbers of his early life, standing far above the forest, and stretching heavenward to receive the full force of the elements, but rugged and determined to search for and discover new and undeveloped horizons. . . . An expert hunter and horseman, on and off the bench, he is often known to ride off alone in search of a principle of law, later returning with a limit of game that usually opens the eyes of his companions, in wonderment, and presents the legal profession a feast One of the truly great men in California's judicial history.¹¹

Today, I suppose, some people who do not have comparable respect for such courage, independence, and imagination might call him an "activist" judge.

It is fitting that Golden Gate University School of Law honors Justice Carter with this lecture in his name. In light of his example and his independent spirit that attends this lecture, my theme is "Judicial Independence: A Cornerstone of Liberty." The views I state are personal.

Today, I would like to address five questions: (1) What is "judicial independence"? (2) Why is judicial independence important? (3) Can we distinguish between appropriate and inappropriate criticism of the judiciary? (4) What should be done about the public's inadequate understanding of the judiciary? (5) Why is better public understanding of judicial independence important, especially now?

I will not explore other significant questions that include: the selection, retention, and removal of judges; elections of state judges; different approaches to interpreting the

¹⁰ Jesse Carter, Justice, Supreme Court of California, Address at The Lawyer's Club of San Francisco: Recent Trend in Court Decisions in California (Mar. 19, 1953), available at <http://www.ggu.edu/lawlibrary/jesseccarter/speeches/attachment/021054.pdf> (last visited Jan. 6, 2007).

¹¹ JOHNSON, *supra* note 1, at 169.

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Constitution; and the provision of adequate resources and salaries to the judiciary.¹²

In September 2006, the American Law Institute (“ALI”) and the Georgetown Law Center sponsored a Conference on the State of the Judiciary.¹³ Justice Stephen Breyer, the author of the book *Active Liberty*, a term which he says implicates “not only freedom from government coercion but also the freedom to participate in the government itself,”¹⁴ and retired Justice Sandra Day O’Connor, the author of the book *The Majesty of the Law: Reflections of a Supreme Court Justice*¹⁵ as well as statements on judicial independence¹⁶ led the conference as

¹² See, e.g., Chief Justice John G. Roberts, Jr., 2006 Year-End Report on the Federal Judiciary 1-2 (Jan. 1, 2007) (focusing on the sole issue of judicial pay and its impact on the strength and independence of the federal judiciary), available at <http://www.supremecourtus.gov/publicinfo/year-end/2006year-endreport.pdf> (last visited Jan. 19, 2007). For a discussion of these questions by California’s Chief Justice, see Ronald M. George, Chief Justice, Supreme Court of California, Challenges Facing an Independent Judiciary, Address at New York University School of Law for the 11th Annual Justice William J. Brennan, Jr. Lecture on State Courts and Social Justice (Jan. 26, 2005), in 80 N.Y.U. L. REV. 1345 (2005), available at <http://www.law.nyu.edu/journals/lawreview/issues/vol80/no5/NYU504.pdf> (last visited Jan. 6, 2007), and Chief Justice Ronald George Urges Stronger Institutional Independence and Identity, in REPORT, THE NEWSLETTER OF THE INSTITUTE OF JUDICIAL ADMINISTRATION AT THE NYU SCHOOL OF LAW (Issue No. 2, Summer 2005). For a significant recent recommendation on the critical link between sufficient judicial salaries and judicial independence, see Judicial Compensation and Benefits Commission, Report Submitted to the Minister of Justice of Canada (May 31, 2004), available at <http://www.quadcom.gc.ca/rpt/report.20040531.html> (last visited Jan. 6, 2007). See also An Independent Judiciary, Report of the ABA Comm. on Separation of Powers and Judicial Independence (1997), available at <http://www.abanet.org/govaffairs/judiciary/report.html> (last visited Jan. 6, 2007).

¹³ For the program agenda and links to transcripts and webcasts, see American Law Institute & Georgetown University Law Center, Fair and Independent Courts: A Conference on the State of the Judiciary (Sept. 28-29, 2006), available at <http://www.law.georgetown.edu/judiciary> (last visited Jan. 6, 2007). For background papers prepared for the conference, see AMERICAN LAW INSTITUTE & GEORGETOWN UNIVERSITY LAW CENTER, FAIR AND INDEPENDENT COURTS: A CONFERENCE ON THE STATE OF THE JUDICIARY—BACKGROUND PAPERS (2006) [hereinafter BACKGROUND PAPERS] (on file with Golden Gate University School of Law, Law Library).

¹⁴ STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 3 (Easton Press 2005). For recent reviews, see, e.g., Paul Gewirtz, *The Pragmatic Passion of Stephen Breyer*, 115 YALE L. J. 1675 (2006); Richard A. Posner, *Justice Breyer Throws Down the Gauntlet*, 115 YALE L. J. 1699 (2006); and Cass R. Sunstein, *Justice Breyer’s Democratic Pragmatism*, 115 YALE L. J. 1719 (2006).

¹⁵ SANDRA DAY O’CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* (Easton Press 2003).

¹⁶ See, e.g., Sandra Day O’Connor, Associate Justice, Retired, Supreme Court of the United States, Remarks at Fair and Independent Courts: A Conference on the State of the Judiciary (Sept. 28, 2006), available at

active co-chairs.

I. WHAT IS “JUDICIAL INDEPENDENCE”?

The term “judicial independence” is widely misunderstood. To some, “independence” connotes inappropriate “activism” or quests to “create” law unbound by the constraints of statutes or common law precedents. For many thoughtful people it is an “I know it when I see it” kind of term.¹⁷ Like the elusive phrase “sustainable development” in environmental discussions, it reflects values that are important to the people who hold them, even though they may not agree about details.

The term in my view connotes judges whose tenure is reasonably secure, who have been selected carefully (recognizing that systems of selection vary), and who will decide cases according to the rule of law unconstrained by political fear, fear for physical safety, or other undue pressures, and uninfluenced by the status of the parties, the threat of salary reductions, or extraneous considerations. These characteristics are the basic ones, although it is possible to imagine heroic judges acting independently even if they were selected solely for political reasons or lacked secure tenure.

Drawing on Isaiah Berlin’s influential *Two Concepts of Liberty*,¹⁸ Professor Pamela Karlan identifies two “judicial

<http://www.law.georgetown.edu/news/documents/CoJ092806-oconnor1.pdf> (last visited Jan. 6, 2007); Sandra Day O’Connor, Address at the Dedication of the Lawton Chiles Legal Information Center at the University of Florida Levin College of Law (Sept. 9, 2005), available at <http://www.law.ufl.edu/dedication/speechtext.shtml> (last visited Jan. 6, 2007); Justice O’Connor Speaks Out, The Third Branch: Newsletter of the Federal Courts, Vol. 38, No. 5 (May 2006), available at <http://www.uscourts.gov/ttb/05-06/justiceoconnor/index.html> (last visited Jan. 6, 2007); Sandra Day O’Connor, Remarks at the Arab Judicial Forum, Manam, Bahrain: The Importance of Judicial Independence (Sept. 15, 2003), available at <http://usinfo.state.gov/journals/itdhr/0304/ijde/oconnor.htm> (last visited Jan. 6, 2007).

¹⁷ Sandra Day O’Connor, Address at the Dedication of the Lawton Chiles Legal Information Center, *supra* note 16. See also Thomas R. Phillips, Chief Justice, Supreme Court of Texas, Electoral Accountability and Judicial Independence, Keynote Address, in 64 OHIO ST. L. J. 137 (2003) (referring both to the “elusive bundle of concepts we call judicial independence” and to the principle that “judicial independence must be balanced by judicial accountability”), available at <http://moritzlaw.osu.edu/lawjournal/issues/volume64/number1/phillips.pdf>. For selected definitions and writings, see <http://www.abanet.org/judind/downloads/jide4-9-02.pdf> (last visited Jan. 6, 2007).

¹⁸ ISAIAH BERLIN, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 188-92 (Oxford Univ. Press 1970).

independences”: one to be “free *from* certain kinds of pressures or influences”; and one to be “free *to* envision and realize certain goals” and policies,¹⁹ essentially those contained in the Constitution, statutes, and the common law rather than held individually by judges. There is relatively “strong consensus for the negative [or ‘freedom from’] conception of judicial independence” but, understandably, more criticism and little consensus on the positive or “freedom to” conception—and, in particular, on how that is manifested in particular cases.²⁰

Another factor that makes the definitional question an uneasy one is judicial ambition. It is one thing to expect a judge not to be influenced by pecuniary concerns or physical threats if adequate salary and reasonable security are provided. It may be another to expect a judge not to be influenced by the subtle pressures of personal ambition, for example, the wish to be promoted to a higher court, to be chosen for a prestigious assignment, or, for some state judges, to be either reelected, retained, or reappointed as state judges or appointed to the federal bench. As Karlan puts it:

Asking the question “Should judges be free from the fear they will be tossed out of office for making a correct but unpopular decision?” suggests one answer. No one explicitly supports that kind of retaliation. But asking the question “Does judicial independence require a conscientious voter to disregard a judge’s decisions when deciding whether to vote to retain her?” suggests a different one.²¹

It bears emphasis that there are relationships between and among our three branches of government. A good example is the United States Supreme Court’s recent decision in *Hamdan v. Rumsfeld*, explaining that the President’s unilateral decision to institute military tribunals for Guantanamo prisoners disregarded statutory constraints imposed by Congress and that the proper way for a President to address such matters is to work with Congress.²² Judicial independence should not

¹⁹ PAMELA S. KARLAN, *Judicial Independences* in BACKGROUND PAPERS, *supra* note 13, at 19, 20 (emphasis in original).

²⁰ *Id.* at 20.

²¹ *Id.* at 25. See Randall T. Shepard, *Telephone Justice, Pandering, and Judges Who Speak Out of School*, 29 Fordham Urb. L.J. 811 (2002).

²² *Hamdan v. Rumsfeld*, 126 S. Ct. 2729, 2774-79 (2006).

connote the image of some isolated jurist in the desert completely separated from reality, including being separated from the legislature and the executive, or immune from constraints or criticism. After all, legislatures provide the funds for the salaries of judges and the operations of their courts and enact jurisdictional statutes; executives often nominate or appoint judges; and, within constitutional limits, both the legislature and the executive can change the law that a judge has applied, sometimes in an “ongoing colloquy” between the branches.²³ Judicial accountability is an integral part of judicial independence.²⁴

II. WHY IS JUDICIAL INDEPENDENCE IMPORTANT?

Our Declaration of Independence describes the British king as having “made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries.”²⁵ Thomas Paine, providing common sense for the American Revolution, said, “[w]here, you may ask, is our king? In monarchies, the king is law. In our democracy, the law is king.”²⁶ In contrast to monarchical domination, Article III of our Constitution provides that federal judges “hold their Offices during good Behaviour”²⁷ and that their compensation

²³ RUSSELL R. WHEELER & ROBERT A. KATZMANN, *A Primer on Interbranch Relations*, in BACKGROUND PAPERS, *supra* note 13, at 167; ROBERT A. KATZMANN, *Judiciary and Congress*, in JUDGES AND LEGISLATORS, TOWARD INSTITUTIONAL COMITY 21 (Robert A. Katzmann ed. 1988); STEPHEN B. BURBANK, *Judicial Independence, Judicial Accountability and Interbranch Relations*, in BACKGROUND PAPERS, *supra* note 13, at 189; ROBERT A. KATZMANN, COURTS AND CONGRESS 1-8 (Brookings Institution Press 1997).

²⁴ Compare, BURBANK, *supra* note 23, at 189, Stephen B. Burbank, *Judicial Accountability to the Past, Present, and Future: Precedent, Politics and Power*, 28 U. ARK. LITTLE ROCK L. REV. 19 (2005), Stephen B. Burbank, *What do We Mean by “Judicial Independence”?*, 64 OHIO ST. L.J. 323 (2002), and JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH (Stephen B. Burbank & Barry Friedman eds., 2002), with JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD (Peter H. Russell & David M. O’Brien eds., 2001), and JUDICIAL INTEGRITY (Andras Sajó ed., 2004).

²⁵ THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776).

²⁶ See Theodore C. Sorensen, Pro Bono Publico Luncheon Address at the ABA Annual Conference: Protecting the Rule of Law (Aug. 7, 2006), available at <http://www.abanet.org/media/docs/sorensenspeech8706.pdf> (last visited Jan. 6, 2007).

²⁷ U.S. Const. art. III. See Akhil Reed Amar, AMERICA’S CONSTITUTION: A BIOGRAPHY 218-25 (Random House 2005) (discussing “good behavior” clause).

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“shall not be diminished during their Continuance in Office.”²⁸ Independence of judges from the will of the executive and from threats to their compensation is crucial. Security of judicial tenure also is crucial, although it varies among jurisdictions.

Gerhard Casper, Professor and President Emeritus of Stanford University, and Kathleen Sullivan, renowned law professor and advocate, have aptly written that “[t]he point of insulating judges from the winds of politics is ultimately to protect individual rights from potential tyranny by the majority.”²⁹ The Massachusetts Constitution of 1780 stated that “[i]t is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice.”³⁰ Alexander Hamilton, writing in *The Federalist* No. 78, stated that “[l]iberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments.”³¹

Judicial independence is especially important today because the judiciary and the rule of law are under relentless and severe attacks from various quarters. In ways that both challenge Congress and may implicate the judiciary, the President is bypassing the separation of powers, for example, through the misuse of so-called “signing statements,” which state that he will not or may not follow an act of Congress, a practice recently and correctly condemned by the American Bar Association.³² A notorious example is his recent statement that he will not follow the McCain Amendment,³³ which forbids any

²⁸ U.S. Const. art. III.

²⁹ Gerhard Casper & Kathleen Sullivan, *Proposal for a Conference on the Judiciary* (Nov. 8, 2005) (draft on file with author). On September 28 and 29, 2006, the American Law Institute and Georgetown University Law Center cosponsored an invitational conference on the state of the judiciary. The draft proposal prepared by Casper and Sullivan was an essential early analysis that helped lead to the conference.

³⁰ MASS. CONST. pt. 1, art. XXI.

³¹ THE FEDERALIST No. 78 (Alexander Hamilton).

³² See AMERICAN BAR ASSOCIATION, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE (Aug. 2006), *available at* http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf (last visited Jan. 6, 2007).

³³ News Release, Office of the Press Secretary, President’s Statement on H.R. 2863, the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (Dec. 30, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html> (last visited Jan. 19, 2007). For a commentary on the President’s signing statement, see

U.S. official to use torture or cruel, inhuman, or degrading treatment on prisoners, if he thinks that doing so would be necessary to prevent terrorist attacks.³⁴ His government has created and maintained a climate of fear and repression accompanied by deception and secrecy, a subject I addressed in a recent talk entitled *Citizenship in a Time of Repression*.³⁵ His administration has authorized cruel, inhuman, and degrading treatment of prisoners, unlawful detentions, renditions of individuals to foreign countries, unconstitutional tribunals, and warrantless wire-tapping. Congress and the President sought to influence the judicial outcome of a single state case in the Terri Schiavo matter.³⁶ Congressman Tom DeLay, then powerful, now disgraced, declared that “[w]e will look at an arrogant, out-of-control, unaccountable judiciary that thumbed their noses at Congress and the President.”³⁷ The “time will come,” he said, “for the men responsible for this to answer for their behavior.”³⁸ Shortly after the courts refused to intervene in the Schiavo case, Tom Toles, in an editorial cartoon published in the Washington Post, depicted a Republican elephant in a business suit railing against a judge in the courtroom, with the judge saying: “I didn’t do what he wanted

Marty Lederman, *So Much for the President's Assent to the McCain Amendment* (Jan. 2, 2006), available at <http://balkin.blogspot.com/2006/01/so-much-for-presidents-assent-to.html> (last visited Jan. 19, 2007). See S. Amend. 1977 to H.R. 2863, 109th Cong. (2005). “The nine senators who voted against McCain’s amendment—and for torture—deserve special recognition, for they are true authoritarians: Senators Wayne Allard (R-CO), Christopher Bond (R-MO), Tom Coburn (R-OK), Thad Cochran (R-MS), John Cornyn (R-TX), James Inhofe (R-OK), Pat Roberts (R-KS), Jeff Sessions (R-AL), and Ted Stevens (R-AK).” JOHN DEAN, CONSERVATIVES WITHOUT CONSCIENCE 165 (Viking 2006). See also *infra* note 82.

³⁴ See Charlie Savage, *Bush could bypass new torture ban*, THE BOSTON GLOBE, Jan. 4, 2006, at A1.

³⁵ See Michael Traynor, Address at the Sixteenth Thomas E. Fairfield Lecture: *Citizenship in a Time of Repression* (Apr. 23, 2004), in 2005 WIS. L. REV. 1 (2005), republished in 35 STETSON L. REV. 775 (2006), and in 16 EXPERIENCE 2 (Winter 2006) (abbreviated version without footnotes).

³⁶ See John-Thor Dahlburg & Richard Simon, *Schiavo Taken Off Food Supply Congress tries to stop the process with subpoenas but a judge presses ahead with his order. In Florida and the capital, the rhetoric heats up*, L.A. TIMES, Mar. 19, 2005, at 1; Jerome R. Stockfish, *Schiavo Showdown*, TAMPA TRIB., Mar. 24, 2005, at 1; Sandy Bauers, *Congress tries again to stop Schiavo death*, PHILA. INQUIRER, Mar. 20, 2005, at A1.

³⁷ Bill Sammon, *Pro-lifers hear call to overhaul ‘arrogant’ judiciary*, WASH. TIMES, Apr. 1, 2005, at A1.

³⁸ *Id.*

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so now the complaint is 'inactivist' judges."³⁹ In recent years judges and members of their families have been murdered or threatened with violence.⁴⁰

Disagreement with judicial decisions has provoked demands that judges be impeached or recalled⁴¹ and, in the case of the Ninth Circuit, that an entire circuit be divided.⁴² In South Dakota, the voters in November 2006 resoundingly declined to abrogate the traditional immunity that judges have had from liability for their decisions. The initiative, called "J.A.I.L." for "Judicial Accountability Initiative Law," sought to remove judicial immunity and establish special grand juries to hold judges accountable for decisions.⁴³ Though soundly defeated, this initiative may provide the blueprint for similar initiatives in other states. As my ALI colleague, U.S. District Judge Paul Friedman, has said, "It is hard to remember a time when judges, courts, and the judicial branch in general were subjected to so much gratuitous criticism, vitriolic commentary,

³⁹ Tom Toles, *Cartoons*, Wash. Post, April 6, 2005, available at <http://www.washingtonpost.com/wp-srv/opinion/tolesv1.html?name=Toles&date=20050406> (last visited Jan. 6, 2007).

⁴⁰ See CBS News, *Judge Killed In Atlanta Courtroom* (Mar. 11, 2005), <http://www.cbsnews.com/stories/2005/03/11/national/main679651.shtml> (last visited Jan. 6, 2007); see also CNN.com, *Police seek help after judge's family slain* (Mar. 2, 2005), <http://www.cnn.com/2005/US/03/01/bodies.found/> (last visited Jan. 6, 2007).

⁴¹ See, EMILY FIELD VAN TASSEL ET AL., FED. JUDICIAL CTR., WHY JUDGES RESIGN: INFLUENCES ON FEDERAL JUDICIAL SERVICE, 1789 TO 1992 (1993), available at [http://www.fjc.gov/public/pdf.nsf/lookup/judgeres.pdf/\\$File/judgeres.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/judgeres.pdf/$File/judgeres.pdf) (last visited Jan. 6, 2007).

⁴² H.R. 211, 109th Cong. (2005), available at <http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.211> (last visited Jan. 6, 2007). See, e.g., Press Release, Earthjustice, House Votes to Gerrymander the Ninth Circuit Court of Appeals (Oct. 5, 2004), http://www.earthjustice.org/news/press/004/house_votes_to_gerrymander_the_ninth_circuit_court_of_appeals.html (last visited Jan. 6, 2007); Vawter Parker, *Right-Wingers Running Full Court Press* (Apr. 15, 2005), http://www.earthjustice.org/our_work/buck_in_brief/right_wingers_running_full_court_press.html (last visited Jan. 6, 2007). For a comprehensive website of references on this subject, see Earthjustice at <http://www.earthjustice.org/> (last visited Jan. 6, 2007).

⁴³ More about "J.A.I.L." can be found at the sponsor's website, <http://www.jail4judges.org> (last visited Jan. 6, 2007). "J.A.I.L." was overwhelming defeated by South Dakota voters in the 2006 election. See, e.g., Molly McDonough & Debra Cassens Weiss, *Huge Defeat for 'JAIL 4 Judges'* (Nov. 2006), <http://www.abanet.org/journal/redesign/n8elect.html> (last visited Jan. 6, 2007). "In the nation's marquee battle over judicial independence, South Dakota voters rejected the Judicial Accountability Initiative Law, aka 'JAIL 4 Judges'-which would have created a constitutional amendment abolishing judicial immunity-by a resounding 90-10 margin." *Id.*

and purposely misleading attacks.”⁴⁴ He is concerned that “if this current, often politically motivated drumbeat against judges continues unchallenged, more and more people . . . will lose faith not just in the courts but in the rule of law itself.”⁴⁵

In earlier years, our country’s faith in and adherence to the rule of law had been a cause for hope for people as well as an inspiration to judges not just in America but also in other countries. If that faith evaporates and injustice consequently increases, the repercussions will be global. As Martin Luther King wrote in *Letter from Birmingham Jail*, “Injustice anywhere is a threat to justice everywhere. We are . . . tied in a single garment of destiny. Whatever affects one directly, affects all indirectly.”⁴⁶

III. CAN WE DISTINGUISH BETWEEN APPROPRIATE CRITICISM AND INAPPROPRIATE CRITICISM OF THE JUDICIARY?

Judges are public officials. With rare exceptions, their rulings are public records. Their actions in court are usually open to the public and often also are recorded by a court reporter or tape recorder, although such recordings cannot fully capture the judge’s demeanor.

Judges are also subject to procedural and substantive constraints, such as principles of personal jurisdiction, subject matter jurisdiction, standing, ripeness, mootness, applicable statutes and rules, the common law, and precedent and stare decisis.⁴⁷ Courts other than the Supreme Court of the United States or the highest state court on a nonfederal issue are also subject to appellate review. They are not free to disregard these constraints. In appellate courts, panels of three or more judges provide an additional safeguard against one judge

⁴⁴ Paul L. Friedman, Commencement Address at the University of Buffalo Law School, State University of New York (May 21, 2005) (on file with author).

⁴⁵ *Id.*

⁴⁶ Martin Luther King, Jr., *Letter from Birmingham Jail* (Apr. 16, 1963), available at <http://www.nobelprizes.com/nobel/peace/MLK-jail.html> (last visited Jan. 6, 2007). See Anthony M. Kennedy, *Law and Belief*, 34 TRIAL 22 (1998). “The people of Eastern and Central Europe . . . look to the United States to see the state of our law, the tenor of our public discourse, and the condition of our whole social order. What they see may make all the difference in their determination to persist, their capacity to believe.” *Id.* at 24.

⁴⁷ See, e.g., Karlan, *supra* note 19. But cf. William P. Marshall, *Conservatives and The Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217 (2002).

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disregarding applicable law. Although federal judges are rarely impeached and removed from office, the circuit courts of appeal occasionally administer discipline.⁴⁸ State judges are subject to censure and removal for misconduct or disability, for example, in California by a Commission on Judicial Performance and ultimately by the state supreme court.⁴⁹ Judges are further subject to removal by the electorate—for any reason or for no reason—when they run for reelection or retention. Moreover, most judges want to establish a good reputation with their colleagues, the profession, and the public.

On various matters, judges are appropriately accorded discretion and their exercise of that discretion is reviewable only for abuse. It is important to have judges exercise their discretion with judicial temperament, impartiality, and wisdom together with a sense of responsibility for seeking the right answers to the questions before them.

Two key implications of the foregoing group of constraints are: (1) they provide litigants and the public an extensive set of safeguards against judicial abuse or an individual judge's pursuit of personal goals or policies; and (2) they provide objective standards for analyzing and critiquing individual decisions. If critics think that a decision is wrong, invoking one or more of these objective standards in criticizing a decision not only is a permissible exercise of a First Amendment right, it also is healthy and constructive. The law reviews are full of articles and student notes that often criticize as well as sometimes praise a judicial decision. When they or other commentators criticize a judicial decision for exceeding or violating one of these standards, they contribute to the

⁴⁸ See STEPHEN BREYER ET AL., IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980, A REPORT TO THE CHIEF JUSTICE (Sept. 2006), available at <http://supremecourtus.gov/publicinfo/breyercommitteereport.pdf> (last visited Jan. 6, 2007). See also, Tony Mauro, *New Rules Mean Shift Toward Accountability for Judiciary* (Sept. 20, 2006), <http://www.law.com/jsp/article.jsp?id=1158682104669> (last visited Jan. 6, 2007).

⁴⁹ The California Constitution provides: "The Commission on Judicial Performance may disqualify a judge from acting as a judge, without loss of salary, upon notice of formal proceedings by the commission charging the judge with judicial misconduct or disability." CAL. CONST. art. VI, § 18 (b). In addition, "[u]pon petition by the judge or former judge, the Supreme Court may, in its discretion, grant review of a determination by the commission to retire, remove, censure, admonish, or disqualify pursuant to subdivision (b) a judge or former judge." *Id.* at § 18 (d). See also, CAL. CIV. PROC. CODE §§ 170.1-170.9 (West 2006); State of California, Commission on Judicial Performance, <http://cjp.ca.gov/> (last visited Jan. 6, 2007).

marketplace of ideas for potential improvement. Because their comments by definition invoke an objective standard, they can be assessed for their persuasiveness, objectivity, and rationality.

It also is appropriate as well as potentially constructive for commentators to criticize judges that do not live up to minimal standards. For example, is the judge prepared, competent, and alert? Is she courteous to witnesses, jurors, parties, counsel, court staff, and others? Is the hearing and decision unburdened by undue delay? Does the judge listen impartially to the evidence and argument? If a written decision is prepared, is it intelligible? Critical comments again can be evaluated on the basis of their persuasiveness, objectivity, and rationality. An example of such commentary is Dean Roscoe Pound's famous speech, given a century ago, entitled *The Causes of Popular Dissatisfaction with the Administration of Justice*.⁵⁰

Looking at our entire system of justice, of which the courts are a crucial but not the only part, other kinds of public criticism are useful. For example, many of the legal needs of low-income and middle-income people are unmet. Many civil litigants are unrepresented by counsel. Although *Gideon v. Wainwright*⁵¹ and subsequent decisions promise indigent defendants in criminal cases a constitutional right to an appointed lawyer, often such counsel are inadequately compensated, overworked, underresourced, undersupervised, and unable to provide effective representation.⁵² As David Udell and Rebekah Diller of the Brennan Center for Justice point out:

[F]or people with physical or psychiatric disabilities, court buildings and court procedures pose barriers that may be insurmountable. . . . [F]or people with limited English proficiency, the lack of translation and interpreting services in many of the nation's courts can also be insurmountable. . . . [T]he role of the courts is increasingly circumscribed by laws

⁵⁰ Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 Rep. A.B.A. 395 (1906), reprinted in 35 F.R.D. 241, 273 (1964). The ALI-Georgetown University Law Center Conference on the State of the Judiciary marked the 100th anniversary of Dean Pound's speech.

⁵¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁵² DAVID S. UDELL & REBEKAH DILLER, ACCESS TO THE COURTS, in BACKGROUND PAPERS, *supra* note 13, at 212.

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and by court decisions that eliminate whole categories of claims from the courts' jurisdiction.⁵³

For example, government efforts have been made to circumscribe the function of the courts in reviewing government conduct in the so-called "war on terror,"⁵⁴ in reviewing decisions applying immigration law,⁵⁵ and in reviewing claims of prisoners challenging conditions of imprisonment.⁵⁶ Court decisions also have enforced contractual limitations that curtail drastically the ability of consumers and employees to present their claims to a court.⁵⁷

Turning to the needs of businesses, which increasingly rely on arbitration clauses and alternative methods of resolving disputes, including mediation, can the courts meet their needs? Those needs often include the need to select an expert decision maker, to manage and limit discovery, to schedule a case conveniently, to resolve a dispute privately, to reach an expeditious resolution without undue cost, and to avoid the perceived risks of a jury trial.⁵⁸ With intelligence and management, the courts may be able to respond positively to many of these needs, with the possible exception of the privacy interest given the public nature of their responsibilities.

In May 2006, Chief Justice John Roberts gave a welcome and friendly greeting to the members of the American Law

⁵³ *Id.* at 211.

⁵⁴ *Id.* at 228.

⁵⁵ *Id.* at 231.

⁵⁶ *Id.* at 233.

⁵⁷ See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (holding that forum selection clauses are presumptively valid unless unreasonable or unconscionable); *United Rentals, Inc. v. Pruett*, 296 F. Supp. 2d 220 (D. Conn. 2003) (applying *Shute* to uphold a forum selection where plaintiff failed to show clause was unreasonable). See also *Cooper v. MRM Inv. Co.*, 367 F.3d 493 (6th Cir. 2004) (enforcing arbitration clause in employment agreement); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004) (enforcing arbitration clause in consumer service agreement). But see *Aral v. Earthlink*, 36 Cal. Rptr. 3d 229 (2005) (holding that contractual provisions waiving statutory consumer protections are unenforceable); *America Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699 (2001) (holding same).

⁵⁸ See Geoffrey C. Hazard et al., *Reporters' Preface to ALI/UNIDROIT, PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE* xxvii (Cambridge Univ. Press 2006) ("[A] system of procedure acceptable generally throughout the world could not require jury trial and would require much more limited discovery than is typical in the United States.").

Institute at our annual meeting in Washington, D.C.⁵⁹ He distinguished between “informed criticism of judicial decisions,” and “collateral attacks” on judges “because of disagreement with their decisions.”⁶⁰ What are the limits, if any, to criticism of individual judges, individual decisions, and the judiciary as an institution? Apart from violations of the criminal law or acts that constitute contempt of court, given the extensive protections of the First Amendment, there are very few limits on what is permissible criticism, as distinguished from what is appropriate or fair criticism.

Thomas Jefferson, for example, challenged life tenure for judges and said that “man is not made to be trusted for life, if secured against all liability to account,” and that judges were “thieves of liberty.”⁶¹ Theodore Roosevelt, who had appointed Justice Holmes, strongly expressed his disappointment with Holmes after he sided with the trusts in the *Northern Securities*⁶² case, stating: “I could carve out of a banana a judge with more backbone.”⁶³ Franklin Delano Roosevelt tried to pack the Supreme Court and accused it of establishing itself as a “third house of Congress—a superlegislature.”⁶⁴ Although they later attempted clarifications, former California Governor Gray Davis said “[m]y appointees should reflect my views. . .

⁵⁹ John G. Roberts, Jr., Chief Justice, Supreme Court of the United States, Remarks at the Opening Session of the 83rd Meeting of the American Law Institute 13 (May 15, 2006), available at <http://www.ali.org/ali/5-23-06Roberts.pdf> (last visited Jan. 6, 2007).

⁶⁰ *Id.* at 17.

⁶¹ THOMAS JEFFERSON, *Letter to Monsieur A. Coray, October 31, 1823*, in 15 THE WRITINGS OF THOMAS JEFFERSON 486-87 (Andrew Lipscomb ed., 1904), available at <http://www.bartleby.com/73/940.html> (last visited Jan. 6, 2007). See THOMAS JEFFERSON, *Letter to Judge Spencer Roane, March 9, 1821*, in 15 THE WRITINGS OF THOMAS JEFFERSON at 326, available at <http://www.bartleby.com/73/942.html> (last visited Jan. 6, 2007); THOMAS JEFFERSON, *Letter to Thomas Ritchie, December 25, 1820*, 10 THE WRITINGS OF THOMAS JEFFERSON 170-71 (Paul L. Ford ed., 1892-99), available at <http://www.bartleby.com/73/943.html> (last visited Jan. 6, 2007). See also KERMIT L. HALL, *Judicial Independence and the Majoritarian Difficulty*, in THE JUDICIAL BRANCH 69 (Oxford Univ. Press 2005).

⁶² *N. Sec. Co. v. United States*, 193 U.S. 197 (1904).

⁶³ HALL, *supra* note 61, at 77.

⁶⁴ See Tony Mauro, *O'Connor Fires Back on Judicial Independence*, LEGAL TIMES (Nov. 28, 2005) (reporting Justice Sandra Day O'Connor's recitation of the Franklin Delano Roosevelt quote), available at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1132740311603> (last visited Jan. 6, 2007).

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[they] are not there to be independent agents,”⁶⁵ and Senator John Cornyn, a former member of the Supreme Court of Texas,⁶⁶ prompted an understandably concerned Justice O’Connor to say, “It doesn’t help when a high-profile senator, after noting that decisions he sees as activist cause him great distress, suggests that there might be a cause-and-effect connection between such activism and recent episodes of courthouse violence.”⁶⁷

Given such notorious illustrations of irresponsible comments from high public officials, can we educate the public to distinguish between informed criticism and collateral attack? This question leads to my next one.

IV. WHAT CAN WE DO ABOUT THE PUBLIC’S INADEQUATE UNDERSTANDING OF JUDICIAL INDEPENDENCE?

I start with the following suggestions:

(1) If the criticism is not based on an objective standard but simply on the speaker’s personal opinion, or religious belief, or disagreement with the decision or the underlying law, it should be unpersuasive to fair-minded listeners. The same is true for attacks on the integrity or motives of judges. Disparaging a judge as “soft” on criminals, or “political”, “immoral”, or “anti-religious” does not invoke objective standards.

(2) Because of ethical considerations,⁶⁸ judges rarely

⁶⁵ HALL, *supra* note 61, at 72.

⁶⁶ See John Cornyn, United States Senator, Biography, at <http://cornyn.senate.gov/> (last visited Jan. 6, 2007).

⁶⁷ Sandra Day O’Connor, Address at the Dedication of the Lawton Chiles Legal Information Center, *supra* note 16. For Senator Cornyn’s original statement see 151 Cong. Rec. S3124 (Apr. 4, 2005), and for his attempted clarification see 151 Cong. Rec. S3235 (Apr. 5, 2005).

⁶⁸ See MODEL CODE OF JUD. CONDUCT Canons 1, 2 (2004) (stating that “[a] judge shall uphold the integrity and independence of the judiciary” and “[a] judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.”); see also *Republican Party v. White*, 536 U.S. 765 (2002) (holding that the “announce clause” in the state’s canon of judicial conduct, which prohibited candidates for judicial election from announcing their views on disputed legal or political issues, violated the First Amendment). See, e.g., Tobin A. Sparling, *Keeping Up Appearances: The Constitutionality of the Model Code of Judicial Conduct’s Prohibition of Extrajudicial Speech Creating the Appearance of Bias*, 19 GEO. J. LEGAL ETHICS 441 (2006). An excellent starting point for civic education about the role of the judiciary is Justice Ginsburg’s dissenting opinion in *Republican Party v. White*, in which she was joined by Justices Stevens, Souter, and Breyer in views that may someday reflect the prevailing

respond to attacks on their rulings. Such attacks are a cheap shot for complainers or bullies like Tom DeLay. Most people have an innate sense of fairness. If adequately informed, perhaps they may be unwilling to be persuaded by a cheap shot.

We have a long way to go, however, in educating the public about judicial independence.

About thirty years ago, I served on the California Commission on Fair Judicial Election Practices. At a public hearing in Los Angeles, witnesses did not comprehend the difference between state or county legislators campaigning on their past records and future programs and judicial candidates who were neither advocates for their decisions nor sponsors of program agendas. Some witnesses wondered why, for example, judges should not have to defend their sentences in particular cases. The public does not seem to appreciate that every judicial election presents both the opportunity to educate the public about the judiciary and the risk of misinformation and partisanship.⁶⁹ I do not sense any improvement in public understanding or appreciation for the role of our judiciary over the past thirty years. In fact, the situation has gotten worse. With the reduced emphasis on teaching civics in the schools,⁷⁰ the prominence of so-called “judicial reality” television shows that do not necessarily correspond to reality, the general failure of the media to educate the public seriously and in depth, and public apathy in general, the public does not have a good understanding of the role of judges or the importance of

law if the Supreme Court chooses to overrule or limit the holding in that case. Her opening paragraph begins by stating that, “Whether state or federal, elected or appointed, judges perform a function fundamentally different from that of the people’s elected representatives.” *Republican Party v. White*, 526 U.S. at 803.

⁶⁹ See *In re Angel*, 867 So. 2d 379 (Fla. 2004) (holding that the partisan political activity during campaign for judicial office warranted a judge’s public reprimand). See also National Judicial College, NATIONAL SYMPOSIUM ON JUDICIAL SPEECH—POST WHITE (Feb. 24, 2005), available at http://www.abanet.org/judicialethics/meetings/transcript_022405_part1.pdf (last visited Jan. 6, 2007).

⁷⁰ See, e.g., JUDITH TORNEY-PURTA ET AL., THE INT’L ASS’N FOR THE EVALUATION OF EDUC. ACHIEVEMENT, EXECUTIVE SUMMARY, CITIZENSHIP AND EDUCATION IN TWENTY-EIGHT COUNTRIES: CIVIC KNOWLEDGE AND ENGAGEMENT AT AGE FOURTEEN 13-14 (2001) (concluding that civic education is currently a low status subject in many countries, yet teachers in most countries agree that teaching civics makes a difference for students and communities), available at http://www2.huberlin.de/empir_bf/Exe_Sum_embargoed.pdf (last visited Jan. 6, 2007).

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their independence.

A recent American Bar Association poll found that over fifty-six percent of the American public agrees with the statement that “judicial activism . . . seems to have reached a crisis. Judges routinely overrule the will of the people”⁷¹ On August 31, 2006, the Annenberg Public Policy Center released a survey that is most disturbing. Only fifty-eight percent of Americans believe that if the President disagrees with a Supreme Court ruling, he should nevertheless follow it rather than do what he thinks is in the country’s best interests. The percentage drops to fifty-three percent if the President believes the ruling will prevent him from protecting the country against terrorist attack.⁷²

The idea that the President can defy a Supreme Court order should alarm us. We should view it not as an issue of partisan politics but as a fundamental issue of government. Conscientious conservatives, for example, are indeed concerned. For example, in his recent book *Conservatives Without Conscience*, John Dean, a Goldwater conservative, says that the claim of authoritarian conservatives that the President is not bound by rulings of the Supreme Court, or for that matter by acts of Congress, is “truly frightening in its implications.”⁷³ Dean is deeply concerned that “the authoritarians, who have already taken control, will take American democracy where no freedom-loving person would want it to go.”⁷⁴

In her opening statement on the rule of law as the new Chair of the ABA Section of Litigation, my ALI colleague Kim Askew described Mamie Farley, her fourth grade teacher:

She introduced me to the principles of “rule of law” and “independence of the judiciary.” . . . [S]he made civics and

⁷¹ Martha Neil, *Half of U.S. Sees ‘Judicial Activism Crisis,’ ABA Journal Survey Results Surprise Some Legal Experts*, ABA Journal eReport (Sept. 30, 2005), <http://www.abanet.org/journal/redesign/s30survey.html> (last visited Jan. 6, 2007).

⁷² The Annenberg Public Policy Ctr. of the Univ. of Penn., Release, *Only 53%-58% of Americans Say President Must Follow A Supreme Court Ruling* (Aug. 31, 2006), available at http://www.annenbergpublicpolicycenter.org/Releases/Release_PC20060831.pdf (last visited Jan. 6, 2007).

⁷³ JOHN DEAN, *supra* note 33, at 115.

⁷⁴ *Id.* at 184. See also CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (Basic Books 2005).

government come alive in the class room. She believed in our constitutional system and made its principles a lot more interesting than the usual math and reading assignments. She explained *separation of powers* and the three separate and equal branches of government. She introduced me to the concept of *checks and balances*. Because of her, the terms *independent* and *impartial* became a part of this young student's lexicon. I did not know what the Constitution was before Miss Farley mentioned it, but through her I learned of *Marbury v. Madison* long before my law school days.⁷⁵

How many of us here today can relate similar stories from our childhood or, more recently, from our children or grandchildren in the fourth grade, the seventh grade, or any grade? We need many more Miss Farleys.

Such education is not going to occur just in schoolrooms, new classes in civics, street law programs, and visits by students to courts, important as they are. It must occur also in civic meetings, in internet discussions, in professional organizations, in neighborhood gatherings, in volunteer groups, at the family dinner table, and in the media. In state judicial election campaigns, incumbent judges as well as candidates can educate voters about judicial independence, as Wisconsin Chief Justice Shirley Abrahamson and others have urged.⁷⁶ Justices Breyer, O'Connor, Ginsburg, and Kennedy have taken the lead in educating our citizens about our Constitution.⁷⁷

⁷⁵ Kim J. Askew, *The Rule of Law: Still the Cornerstone*, 32 LITIGATION 1, 1 (2006) (emphasis in original).

⁷⁶ See, e.g., Shirley S. Abrahamson, Chief Justice, Supreme Court of Wisconsin, Address to the Washington State Bar Association: Judicial Independence as a Campaign Platform (Mar. 2005), available at <http://www.wsba.org/media/publications/barnews/2005/mar-05-abrahamson.htm> (last visited Jan. 6, 2007); cf. Shirley S. Abrahamson, Annual Meeting of the Wisconsin Judicial Conference: 2002 State of the Judiciary (Oct. 16, 2002), available at <http://www.wicourts.gov/about/pubs/supreme/docs/judaddress02.pdf> (last visited Jan. 6, 2007). See also An Independent Judiciary, Report of the ABA Commission on Separation of Powers and Judicial Independence, *supra* note 12.

⁷⁷ See BREYER, *supra* note 14; O'CONNOR, *supra* note 15; Ruth Bader Ginsburg, Associate Justice, Supreme Court of the United States, Remarks on Judicial Independence: The Situation of the U.S. Federal Judiciary (Jan. 2001), available at <http://www.law.unimelb.edu.au/news/conf-sem/rule-of-law/GinsburgTranscript.pdf> (last visited Jan. 6, 2007); Anthony M. Kennedy, Associate Justice, Supreme Court of the United States, Bulwarks of the Republic: Judicial Independence and Accountability in the American System of Justice, Address at the ABA Symposium (Dec. 4-5, 1998) ("The law makes a promise—neutrality. If the promise gets broken, the law as we know it ceases to exist. All that's left is the dictate of a tyrant, or perhaps a mob."), *excerpted at*

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Such judges are setting the example of what responsible members of our profession can do.

The media has a special responsibility. Consider, for example, the infamous McDonald's hot coffee case, which became a poster child in the campaign against the judiciary. Most newspaper articles focused on the \$2.7 million verdict for punitive damages. Their selective reporting in general did not report the third-degree burns and permanent scarring the elderly victim suffered, the painful skin grafts she endured, the fact that she was willing to settle for her medical expenses of about \$20,000 and that the company offered her only \$800, the fact that McDonald's coffee was served about twenty degrees higher than what was standard in the trade, the seven hundred previous claims against McDonald's for similar complaints, the company's indifferent response but eventual payment of nearly three quarters of a million dollars to settle such claims; or the reduction by the trial judge of the punitive damage award to \$480,000, after which the parties reached a confidential settlement.⁷⁸

Americans who are informed are ready to renew their natural self-reliance and resiliency. An informed, self-reliant, and resilient public is ready to engage in our democracy. An engaged public will resist abuses of power and threats to judicial independence. It will demand that its President stop abusing executive power and that Congress stand up to him. It will replace timid legislators with courageous ones, authoritarian legislators with freedom-loving ones, and venal legislators with honest ones. Its expressions and actions, literally and figuratively, will be the footsteps of Americans. When elected representatives hear those footsteps, not just once or twice, or here and there, but every day, pounding in a crescendo of strong beats, then, maybe, they will begin to do what is right.

<http://www.abanet.org/judind/downloads/jidef4-9-02.pdf> (last visited Jan. 6, 2007). See also James Podgers, *Freedom 'Hangs in the Balance': Justice Kennedy Calls on Lawyers to Make the Case for Rule-Of-Law Principles*, ABA Journal Annual Meeting Daily Report (Aug. 7, 2006), available at <http://www.abanet.org/journal/daily/am7sem.html> (last visited Jan. 6, 2007).

⁷⁸ See GERALD N. ROSENBERG, *The Impact of Courts on American Life*, in THE JUDICIAL BRANCH 295-96 (Kermit L. Hall & Kevin T. McGuire eds., 2005); Lynn Mather, *Courts in American Popular Culture*, in THE JUDICIAL BRANCH at 243; William Haltom & Michael McCann, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS 7, 236 (Univ. of Chicago Press 2004).

V. WHY IS BETTER PUBLIC UNDERSTANDING OF JUDICIAL INDEPENDENCE IMPORTANT, ESPECIALLY NOW?

Unlike the world astronomers who by resolution can eliminate Pluto from our solar system,⁷⁹ we cannot erase the last six years of our political history. In reviewing these years, I venture to predict that future political historians will help us understand four points.

First, the current President aggressively, relentlessly, and often lawlessly attempted to increase executive power and succeeded in doing so. When the President lacks executive restraint, the other two branches, Congress and the judiciary, in specific cases, are challenged either to check him and keep our system in balance or acquiesce. Acquiescence by one branch increases the pressure on the other.

Second, the Congress as a whole did not stand up to the President, and the majority often accommodated or even applauded him. There were significant exceptions on particular matters such as the McCain Amendment against torture and cruel, inhuman, and degrading treatment,⁸⁰ which the President then undermined with his signing statement.⁸¹ Together with the minority—which itself could have done better—the handful of so-called “moderate” Senators in the majority could have protected both the country and the United States Senate as an independent institution but did not muster the sufficient collective courage, capacity, and will to just say “No” to the President. They all have their excuses and rationales of course, and some showed leadership on individual

⁷⁹ See International Astronomical Union, *IAU 2006 General Assembly: Result of the IAU Resolution Votes* (Aug. 24, 2006), at <http://www.iau2006.org/mirror/www.iau.org/iau0603/index.html> (last visited Jan. 6, 2007). See also Dennis Overbye, *Vote Makes It Official: Pluto Isn't What It Used to Be*, N.Y. TIMES, Aug. 25, 2006, at A13; David Perlman, *Pluto demoted – from 9th planet to just a dwarf: Astronomers vote in Prague, setting rules to determine status of bodies in solar system*, SAN FRANCISCO CHRONICLE, Aug. 25, 2006, at A13.

⁸⁰ National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 1403, 119 Stat. 3136, 3475 (2006). See *supra* note 33 and accompanying text. For various references on the government's constricted definition of torture and use of cruel, inhuman, and degrading treatment, see, e.g., Michael Traynor, *Citizenship in a Time of Repression*, 2005 WIS. L. REV. 1, 4-6 (2005).

⁸¹ News Release, Office of the Press Secretary, President's Statement on H.R. 1815, the National Defense Authorization Act for Fiscal Year 2006 (Jan. 6, 2006), available at <http://www.whitehouse.gov/news/releases/2006/01/20060106-12.html> (last visited Jan. 6, 2007).

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items of legislation or statements. Although it may seem harsh to criticize seemingly well-meaning people, they were the ones who, acting together, could have made an institutional difference but as yet have failed to do so.⁸² By contrast, on June 1, 1950, then-freshman Republican Senator Margaret Chase Smith from Maine delivered her Declaration of Conscience against McCarthyism at a time when such a statement was a rare act of great political courage.⁸³ Although joined by only six

⁸² In an unpublished portion of the speech as given on September 18, 2006, I noted that “there is today, finally, a spark of hope on the torture and tribunal issues.” Michael Traynor, Address at the Golden Gate University School of Law Jesse Carter Distinguished Speaker Series, Constitution Day Lecture: Judicial Independence: A Cornerstone of Liberty 13 (Sept. 18, 2006) (original transcript on file with Golden Gate University Law Review). This “spark of hope” was extinguished shortly thereafter with the enactment of the Military Commissions Act of 2006, which established military commissions for the trial of war crimes. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in Ch. 47A of 10 U.S.C.). The Act greatly curtailed the rights of the defendants tried before such tribunals, and prohibited the invocation of rights under the Geneva Convention. See 10 U.S.C.A. § 948b (West 2006). On remand in the *Hamdan* case, the District Court for the District of Columbia recently ruled that “Congress’s removal of jurisdiction from the federal courts was not a suspension of habeas corpus within the meaning of the Suspension Clause (or, to the extent that it was, it was plainly unconstitutional, in the absence of rebellion or invasion), but Hamdan’s statutory access to the writ is blocked by the jurisdiction-stripping language of the Military Commissions Act, and he has no constitutional entitlement to habeas corpus. Hamdan’s habeas petition must accordingly be dismissed for want of subject matter jurisdiction.” *Hamdan v. Rumsfeld*, No. 04-1519 (JR), slip op. at 22 (D.D.C. Dec. 13, 2006), available at <http://www.dcd.uscourts.gov/opinions/2006/2004CV1519-143711-12132006a.pdf> (last visited Jan. 6, 2006). See also Joseph Blocher, *Combatant Status Review Tribunals: Flawed Answers to the Wrong Question*, 116 YALE L.J. 667 (2006); Amnesty International, *Military Commissions Act of 2006 – Turning Bad Policy into Bad Law* (Sept. 29, 2006), available at [http://web.amnesty.org/library/pdf/AMR511542006ENGLISH/\\$File/AMR5115406.pdf](http://web.amnesty.org/library/pdf/AMR511542006ENGLISH/$File/AMR5115406.pdf) (last visited Jan. 6, 2006); Keith Olbermann, *Special Comment* (Oct. 19, 2006), at <http://www.msnbc.msn.com/id/16442767> (last visited Jan. 6, 2007).

The twelve Democratic senators who voted for the Act deserve special recognition comparable to that given to the nine senators who voted against the earlier McCain Amendment and for torture. The twelve “yea” votes were from Senators Thomas R. Carper of Delaware, Tim Johnson of South Dakota, Mary L. Landrieu of Louisiana, Frank R. Lautenberg of New Jersey, Joseph I. Lieberman of Connecticut, Robert Menendez of New Jersey, Bill Nelson of Florida, E. Benjamin Nelson of Nebraska, Mark L. Pryor of Arkansas, John D. Rockefeller, IV of West Virginia, Ken Salazar of Colorado, and Debbie Stabenow of Michigan. United States Senate Roll Call Votes, 109th Congress – 2nd Session (Sept. 28, 2006), available at http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00259#position (last visited Jan. 6, 2007). See *supra* note 34 and accompanying text (listing the nine senators who voted against the earlier McCain Amendment and for torture).

⁸³ Statement of Senator Margaret Chase Smith, Senator, United States Senate,

colleagues at the time, and disparaged by McCarthy as “Snow White and her Six Dwarfs,”⁸⁴ her brave act helped inspire the country to reject McCarthyism and the Senate to censure him.⁸⁵

Third, although the Supreme Court was responsible for allowing the President to take office without pursuit of further voting or procedures in the Constitution,⁸⁶ it also held in later cases that he had exceeded his powers.⁸⁷ *Hamdan v. Rumsfeld* is the most recent and notable example. It did so, however, with only a fragile majority of justices who displayed courage, judicial independence, and the quiet force of reason.⁸⁸

Fourth, although there were some courageous voices, the American public as a whole was phlegmatic, uninformed, fearful, apathetic, and unengaged.

Will you be a part of changing this sorry history? Are you willing to let the Supreme Court brave the hurricane winds of politics alone? When Judge Learned Hand gave his famous speech entitled *The Spirit of Liberty* to new citizens in 1944, he said: “Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.”⁸⁹

Fifty years ago, when I was in my first year of military service, and when our country was emerging from the

to the President, *Declaration of Conscience* (June 1, 1950), available at <http://www.mcslibrary.org/program/library/declaration.htm> (last visited Dec. 17, 2006).

⁸⁴ TED MORGAN, REDS: MCCARTHYISM IN TWENTIETH-CENTURY AMERICA 394 (Random House 2003) (describing Smith and her colleagues as “Snow White and her Six Dwarfs”). Senator Margaret Chase Smith’s six colleagues were Senators George Aiken of Vermont, Charles Tobey of New Hampshire, Wayne Morse of Oregon, Irving Ives of New York, Edward Thye of Minnesota, and Robert Hendrickson of New Jersey. *Id.* Although he did not join in signing the declaration, Senator H. Alexander Smith of New Jersey also expressed support, therefore filling the role of the “seventh dwarf.” *Id.* See also Geoffrey Wheatcroft, *Point of Order*, NY TIMES, Jan. 4, 2004, at §7, at 9 (reviewing MORGAN, *supra*).

⁸⁵ See S. Res. 301, 83d Cong. (1954).

⁸⁶ See *Bush v. Gore*, 531 U.S. 98 (2000).

⁸⁷ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

⁸⁸ Justice Stevens wrote the majority opinion, while Justice Breyer filed a concurring opinion in which Justices Kennedy, Souter, and Ginsburg joined. *Id.* Note that in the prior decision at the appellate court level, Chief Justice Roberts participated on the panel and the decision went the other way. See *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), *rev’d*, 126 S. Ct. 2749 (2006).

⁸⁹ LEARNED HAND, THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 144 (2d ed. 1953). See also GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 547-52, 639-43 (Harvard Univ. Press 1994).

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McCarthy Era, we faced the real and imagined threats of communism and a Soviet regime that had executed millions of people and enslaved millions of others in hard labor. With reference to Judge Hand's haunting words, my father then remarked as follows:

The judges whose job it is to apply [the Constitution] must carry liberty in their hearts even when other men have ceased to. Who is to say that liberty is dead in the hearts of men who are silent? Liberty is not lost suddenly, catastrophically; it is lost imperceptibly, by erosion. Who is to say it is irretrievably lost until it has died in the hearts of those whose job it was to care that it lived in the hearts of others?⁹⁰

It would be good to be able to count on judges who, like Justice Robert Jackson in *West Virginia Board of Education v. Barnette*⁹¹ (the "Second Flag Salute" case) wrote: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."⁹²

Suppose, however, the day comes when ordinarily cautious judges become timid and uncourageous and when we cannot count on either judges or legislators to protect our liberty. Suppose a vacancy occurs in the Supreme Court during the next two years and the President nominates, and a timid and acquiescent Senate confirms, a justice who will change the delicate balance that now exists on the Court. Suppose that the newly constituted Court no longer stands up to presidential abuse of power. Let us not wait for such a day. Now is the time to educate and engage ourselves and our fellow citizens. It is a critical time.

Brian Jenkins, the dean of America's terrorism researchers, has just published a brilliant and inspiring essay entitled *True Grit: To Counter Terror, We Must Conquer Our Own Fear*.⁹³ In Jenkins' words,

⁹⁰ Roger J. Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L. REV. 230, 241 (1956).

⁹¹ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

⁹² *Id.* at 638.

⁹³ Brian Michael Jenkins, *True Grit: To Counter Terror, We Must Conquer Our*

we in America have spent the past five years scaring the hell out of ourselves. . . . What else but fear can explain the readiness of Americans to tolerate tossing aside the very Geneva Convention agreements the United States had fought to implement? What else but fear could have led Americans to even entertain public arguments in favor of torture and against any restrictions on how we might treat those in custody? There has always been an alternative, a strategy more consistent with American tradition—a strategy aimed at reducing public fear through a different style of communication and governance and at more actively engaging citizens in their own preparedness and response. Such an approach, if adopted, would attack the terror, not just the terrorists. It would see the White House working closely with the legislative and judicial branches to increase security without trespassing on liberty. It would aim at preserving national unity. In sum, it would be a strategy that seeks lasting strength.⁹⁴

CONCLUSION

At the beginning of this talk, I referred to Justice Carter's independent spirit. As I get ready to conclude, I want to take you back to 1953, a year when two significant speeches were made, on different coasts, in different contexts, on different subjects, by different leaders. Each speaker, however, reflected the essential values on which this country is founded.

In his inaugural address, President Eisenhower asked for

the power to discern clearly right from wrong, and allow all our words and actions to be governed thereby, and by the laws of this land. . . . [W]e, the people, elect leaders not to rule but to serve. . . . [Our enemies] feed upon the hunger of others. Whatever defies them, they torture, especially the truth. . . . [W]e Americans know and we observe the difference between world leadership and imperialism; between firmness and truculence; between a thoughtfully calculated goal and spasmodic reaction to the stimulus of

Own Fear, 30 RAND REVIEW 2, 10-19 (2006), available at http://www.rand.org/publications/randreview/issues/summer2006/RAND_Review_summer2006.pdf (last visited Jan. 6, 2007). The essay is drawn from his new book, BRIAN MICHAEL JENKINS, UNCONQUERABLE NATION: KNOWING OUR ENEMY, STRENGTHENING OURSELVES (RAND Corporation 2006).

⁹⁴ *Id.* at 10.

emergencies.⁹⁵

In an address to the Bar Association of Monterey County, entitled *Challenges to Freedom*, Justice Carter spoke not of foreign aggression or subversion but of the manipulation of fear by “self-appointed guardians of our liberties.”⁹⁶

Fear is the most devastating and costly force in the world today [While] the basic concepts of liberty and freedom embraced in our fundamental law—the Declaration of Independence and the Constitution of the United States . . . still sway the American heart, they are being challenged by demagogues who are spreading philosophies of fear, hate and intolerance which are praying [sic] on the minds of hopeless and frustrated men. . . . Fear, hate and hysteria should not be substituted for evidence, reason and common sense as a basis for legislation and court decisions.⁹⁷

It is time for our country and our people and institutions to reaffirm our basic values and show courage in the defense of our liberty. Our liberty and our values are our best defense as well as our best weapon against terror. Our country needs activist citizens.⁹⁸ It is time for our profession to take the lead. A cornerstone of liberty is judicial independence. Whenever politicians or others engage in collateral attacks on judges, lawyers and their bar associations should expose the fallacies immediately, set the record straight, and educate the public.⁹⁹

⁹⁵ Dwight D. Eisenhower, Inaugural Address (Jan. 20, 1953), *available at* <http://www.historycentral.com/documents/Eisenhower.html> (last visited Jan. 6, 2007).

⁹⁶ Jesse W. Carter, Justice, Supreme Court of California, Address before the Bar Association of Monterey County: *Challenges to Freedom* (Mar. 19, 1953), *available at* <http://www.ggu.edu/lawlibrary/jesseccarter/speeches/attachment/031953.pdf> (last visited Jan. 6, 2007).

⁹⁷ *Id.*

⁹⁸ United States Supreme Court Justice Stephen Breyer, in remarks at Princeton on April 30, 2006, said, “We don’t need activist judges, but we do need activist citizens.” See Eric Quiñone, *Breyer: Constitution Views Liberty as Active Citizenship* (May 1, 2006), *available at* <http://www.princeton.edu/main/news/archive/S14/64/89I78/index.xml> (last visited Jan. 6, 2007).

⁹⁹ See, e.g., Bettina B. Plevan, Office of the President, New York City Bar Association, Statement on Threats to Judicial Independence (2005) (expressing the association’s “strong opposition to criticism of members of the judiciary, and threats of retaliation, made recently by members of Congress and others with regard to the state and federal judges who heard proceedings in the Schiavo family litigation”), *available at* http://www.abcnny.org/pdf/PresidentStatement_040805.pdf (last visited Jan. 6, 2007);

A central purpose of a law school is to foster analysis, advocacy, and leadership. We as lawyers can help citizens understand the importance of an independent judiciary and support it. We can help them understand the difference between legitimate criticism and inflated rhetoric, partisan sniping, and other collateral attacks. President James Madison “understood the Constitution as the *people’s* law, which was to be revered and not remolded by their servants.”¹⁰⁰ It seems little to ask that “We the People” stand up for our law, our Constitution, and our judges.

Bea Ann Smith, *Alarming Attacks on Judges: Time to Defend Our Constitutional Trustees*, 80 OR. L. REV. 587 (2001).

¹⁰⁰ LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC* 333 (Cornell Univ. Press 1995) (emphasis in original).