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## ORIGINAL SIN AND JUDICIAL INDEPENDENCE: PROVIDING ACCOUNTABILITY FOR JUSTICES

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## I. A DEFINING CHALLENGE

The independence of the judiciary is an enduring and defining objective of the legal profession. We lawyers, of all citizens, have the greatest stake in shielding judges from intimidation or reward. And that task of protecting judicial independence stands today at the very top of the agenda of the American legal profession.<sup>1</sup>

The integrity of law and legal institutions requires more than just the protection of judges. It is equally dependent on the willingness and ability of judges to maintain virtuous disinterest in their work.<sup>2</sup> Some might explain their occasional failings as manifestations of the original sin inherited from Adam;<sup>3</sup> whatever their source, the proclivities of judges to indulge or celebrate themselves are perpetual temptations and judicial self-restraint is a perpetual challenge. As Cardozo explained: “The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.”<sup>4</sup>

A primary and indispensable constraint on those who judge is the moral constraint imposed by the professional community to which they belong. The primary function of transparency in proceedings at trials and arguments, and of published decisions and opinions explicating judges’ rulings, is to manifest their disinterest not only to the parties whose contentions they judge, but also to their lawyers, who share responsibility for imposing moral judgment on the professionalism of judges.<sup>5</sup>

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1. See CHARLES GARDNER GEYH, WHEN CONGRESS AND COURTS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA’S JUDICIAL SYSTEM 281-82 (2006). There have been many law review symposia on the subject. *E.g.*, Conference, *Fair and Independent Courts: A Conference on the State of the Judiciary*, 95 GEO. L.J. 897 (2007); *Judicial Independence and Democratic Accountability* 61 LAW & CONTEMP. PROBS. 1 (Summer 1998); see also Amy B. Atchison, Laurence Tobe Liebert & Denise K. Russell, *Judicial Independence and Accountability: A Selected Bibliography*, 72 S. CAL. L. REV. 723 (1999).

2. See generally John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353 (1999).

3. TATHA WILEY, ORIGINAL SIN: ORIGINS, DEVELOPMENT, CONTEMPORARY MEANINGS 114 (2002). One need not choose between St. Augustine and Immanuel Kant as to the source of “the human proclivity toward evil as self-love or the instinct of self-interest.” *Id.* Whatever its source, the proclivity is real and a universal problem for judges and those who judge judges.

4. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 168 (1921).

5. “The most vital ingredient ... was ‘intellectual rectitude’; judges must ‘support their

Judicial disinterest may have been made increasingly difficult in the twentieth century by the replacement of legal formalism with a legal realism that commissions judges to be less constrained by preexisting texts and more attentive to the social consequences of their judgments.<sup>6</sup> A secondary effect may be to inflate the collective vanity of the judiciary. The greater freedom judges assert in taking account of the social consequences of their decisions, the harder it may be for them to lay aside their personal political preferences, the related interests of their friends and allies, and the adoration or hostility of a public that either celebrates or attacks them, depending on the reaction to the policy consequences of their decisions. There is, to be sure, no empirical evidence of this effect, but it is reasonable to suspect that it occurs and contributes to public concerns about possible excesses of judicial independence.

As judicial virtue has become more difficult to practice, it has become more in need. The present and rising mistrust of the American judiciary is not a direct consequence of the change in legal philosophy, but there is an obvious connection. As judges have increasingly and openly presumed to shape our polity, citizens who disagree with their politics have felt justified in mistrusting their disinterest and challenging their independence.<sup>7</sup>

It is also increasingly difficult for citizen-lawyers performing their duty to judge the judges to maintain their own disinterest. One form

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judgments with that degree of candor' that will provide 'adequate disclosure of the real steps by which they have reached where they are.'" John Braeman, *Thomas Reed Powell on the Roosevelt Court*, 5 CONST. COMMENT. 143, 150 (1998) (quoting Thomas Reed Powell, *Some Aspects of American Constitutional Law*, 53 HARV. L. REV. 529, 549-50, 552 (1940)); see also Michael Boudin, *Judge Henry Friendly and the Mirror of Constitutional Law*, 82 N.Y.U. L. REV. 975, 988 (2007).

6. See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 297-302 (1996) (explaining early perceptions of the role of the federal judiciary); Herbert Jacob, *The Courts as Political Agencies: An Historical Analysis*, 8 TUL. STUD. POL. SCI. 9 (1962) (explaining the judiciary's evolution). Roberto Unger may overstate the problem, thus:

[T]he policies by which the modern lawyer wants to justify his elaborations of the law tend either to become abstract to the point of meaninglessness or to appear as expressions of an effort to manipulate all rules so as to further the arbitrary preferences of particular interest groups.

ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 210 (1976).

7. See Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 GEO. L.J. 909, 915-16 (2007).

of widely shared human weakness is that which inclines citizen-lawyers to link their respect and support of judges to their own preferences about the outcomes of the cases and political issues judges decide. But another is uncritical fidelity to the judiciary. A failure by the profession to criticize judicial misdeeds deprives judges of the sense of moral accountability to their peers that is sometimes needed to reinforce their capacity to know and restrain themselves. Judging judges wisely, like judging cases wisely, requires self-knowledge, self-discipline, and moral courage on the part of citizen-lawyers and their professional organizations.

Effective moral reinforcement of the disinterest of judges by lawyers requires a system of judicial accountability to deter and punish misconduct that exhibits disrespect for citizens or their rights. Laws are needed both to govern judges' conduct and to provide occasions for judging them. The presence of such legal processes reminds lawyers of their duties and alerts judges to the existence of a judgmental profession. Such laws have been and are evolving in many state judicial systems. Since 1980, 336 state court judges have been removed as a result of disciplinary proceedings.<sup>8</sup> As Charles Geyh has affirmed, the states are "light years ahead of the federal judiciary" in dealing with misconduct of judges.<sup>9</sup> Belated progress has been made in the federal system,<sup>10</sup> but there remains no system of accountability for the misdeeds of Supreme Court Justices other than the impeachment process.

This Essay aims to define a role for citizen-lawyers in advocating and protecting the independence of judges, and especially the independence of Justices of the Supreme Court, who increasingly exercise political power, and who are subject to no personal accountability whatsoever for the social and economic consequences

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8. In 2006, state commissions removed twelve state judges and another eleven resigned in the face of disciplinary proceedings. Pamela A. MacLean, *Transparency Varies Among States*, NAT'L L.J., Feb. 18, 2008, at 18; see PREBLE STOLZ, *JUDGING JUDGES: THE INVESTIGATION OF ROSE BIRD AND THE CALIFORNIA SUPREME COURT* (1981) (providing a poignant account of the 1978 proceeding in California to judge its Supreme Court in a professionally responsible way).

9. MacLean, *supra* note 8, at 19 (quoting Charles Gardner Geyh); see also JAMES J. ALFINI, STEVEN LUBET, JEFFREY SHAMAN & CHARLES GARDNER GEYH, *JUDICIAL CONDUCT AND ETHICS* § 1.04 (4th ed. 2007) (chronicling the history of developments in state law in the second half of the twentieth century).

10. See ALFINI ET AL., *supra* note 9, § 1.13.

of their decisions.<sup>11</sup> The more we confer such political power on our judges, the more important it is that there be a system of disinterested accountability to correct their nonpolitical misdeeds and maintain their awareness of their own mortal limitations. Such a system or process is first a reminder to the profession of its responsibility for addressing judicial sins, and then a reassurance to the public that even Justices are accountable to law. The reform proposed below will not alone reverse the trend of mistrust of the federal judiciary that presently alarms many citizen-lawyers, but it would help.

#### A. *The Founding Vision*

The moral challenge of judicial independence is not new. It may help the reader to consider its presence in the early days of the Republic. The distance in time may help to maintain our own disinterest in assessing alternatives.

The American War for Independence was, the reader knows, initiated and led by a Continental Congress comprised in large part by lawyers presenting themselves as citizens practicing selfless civic virtue, that is, as advocates for the long-term interest of those they purported to serve.<sup>12</sup> Heartened by their shared sense of high purpose and professional commitment, Thomas Paine optimistically proclaimed their achievement: “LAW IS KING.”<sup>13</sup> Paine’s revolutionary vision was that legal texts could and would express the intent of those governed so that disinterested judges could rule in the name of the governed as well as in the name of law, and thus would gain the acceptance and support of those whom they judged.<sup>14</sup> The Declaration of Independence protested, among other grievances,

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11. We apologize for directing our attention here solely to federal courts, which generally receive so much more academic attention than do the state courts that decide many, many more cases. Our excuse for this misdirection is that it enables us to address a wider audience, but one less likely to be usefully influenced by academic utterances. See Robert S. Thompson, *Comment on Professors Karlan’s and Abrams’ Structural Threats to Judicial Independence*, 72 S. CAL. L. REV. 559, 562-63 (1999).

12. PETER CHARLES HOFFER, *THE LAW’S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA* 64 (1990).

13. THOMAS PAINE, *COMMON SENSE* 43 (Bantam Books 2004) (1776).

14. See generally *id.*

the failure of the king to provide the colonials with an independent judiciary whom they could trust to respect their legal rights.<sup>15</sup> The Founders implicitly promised to correct this failing.

But what is it that federal judges and Justices should be “independent” of, other than a malevolent king? The Founders’ answer to that question was never clearly stated, and their obscure text and its intent remain contested issues in contemporary discourse.

Some of the Founders fully understood that the judicial independence on which the rule of law depends is derived from the moral courage and professional self-discipline of judges. Only those qualities enable them to discount not only their own interests but those of their friends and political allies. George Wythe, the first American law professor,<sup>16</sup> for instance, provided a premier example of the virtuous judge who could command respect on the regal scale that Paine had anticipated.<sup>17</sup> Classically minded Virginians compared Wythe to Aristides, “the Just.”<sup>18</sup> It was said of him, and apparently never questioned, that “[a] dirty coin [never] reached the bottom of [George] Wythe’s pocket.”<sup>19</sup> Perhaps best remembered as the law teacher to Thomas Jefferson, John Marshall, and Henry Clay, Wythe concluded his career as the Chancellor of Virginia.<sup>20</sup> Acting in that capacity, he was among the first judges ever to invalidate legislation as inconsistent with the higher law expressed in Virginia’s Constitution.<sup>21</sup> He rendered that courageous judgment

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15. THE DECLARATION OF INDEPENDENCE paras. 11-12 (U.S. 1776). “He has obstructed the Administration of Justice by refusing his Assent to Laws for establishing Judiciary Powers. He has made Judges dependent on his Will alone for the Tenure of their Offices, and the Amount and Payment of their Salaries.” *Id.*

16. E. Lee Shepard, *George Wythe*, in LEGAL EDUCATION IN VIRGINIA 1779-1979, at 749 (W. Hamilton Bryson ed., 1979).

17. His biographies are IMOGENE E. BROWN, AMERICAN ARISTIDES: A BIOGRAPHY OF GEORGE WYTHE (1981); WILLIAM CLARKIN, SERENE PATRIOT: A LIFE OF GEORGE WYTHE (1970); ALONZO THOMAS DILL, GEORGE WYTHE: TEACHER OF LIBERTY (1979); ROBERT BEVIE KIRTLAND, GEORGE WYTHE: LAWYER, REVOLUTIONARY, JUDGE (1982); Robert Kirtland, *George Wythe*, in 24 AM. NAT’L BIOGRAPHY 92 (John A. Garraty & Mark C. Carnes eds., 1999); Shepard, *supra* note 16, at 749.

18. BROWN, *supra* note 17, at 36.

19. *Id.* at 35 (quoting Dice Roberts Anderson, *The Teacher of Jefferson and Marshall*, S. ATLANTIC Q., Oct. 1916, at 333).

20. *Id.* at 254.

21. *Page v. Pendleton*, WYTHE’S REP. 211 (Va. 1793) (invalidating a law of the Commonwealth purporting to extinguish debts owed to English creditors).

alone, knowing that the law he invalidated had favored the interests of his friends and political allies in the revolutionary movement and benefited some of those despised English against whom the Revolution had been waged.

Colonial judges were perceived to be intimidated by the royal government,<sup>22</sup> and the revolutionary lawyers had sensed their lack of judicial independence. They often had in mind the celebrated Edward Coke,<sup>23</sup> who had been dismissed by King James I for his stated disregard of royal preferences in the decision of cases brought before the king's courts.<sup>24</sup> The Glorious Revolution of 1688 had brought King William and Queen Mary to the throne as monarchs who agreed to disown the executive power over the judiciary exercised by King James.<sup>25</sup> The Act of Settlement of 1701, agreed to by the monarchy, declared that their judges would serve for the period of their "good behavior" and be removable only by *address* of Parliament.<sup>26</sup>

The Founders were also familiar with the experience of Francis Bacon. His term as Chancellor of England came to an early end in 1621 when he confessed to committees of Parliament and the House of Lords that he had received financial assistance from claimants whose claims he had upheld.<sup>27</sup> They accepted the familiar wisdom that power corrupts and knew that corruption takes diverse forms.<sup>28</sup> But without pausing during a time of war to study the issues

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22. See, e.g., Saikrishna Prakash & Steven D. Smith, *How To Remove a Federal Judge*, 116 YALE L.J. 72, 104 (2006) (discussing the public perception that judges were controlled by British royals).

23. See ALLEN D. BOYER, SIR EDWARD COKE AND THE ELIZABETHAN AGE 47-48, 191-92 (2003) (describing his celebrity status). See generally CATHERINE DRINKER BOWEN, THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE (1552-1634) (1956).

24. BOWEN, *supra* note 23, at 370-90 (detailing the story of his dismissal).

25. See EVELINE CRUICKSHANKS, THE GLORIOUS REVOLUTION (BRITISH HISTORY IN PERSPECTIVE) (2000) (offering a full account of the event).

26. Act of Settlement of 1701, 12 & 13 Will. 3, c. 2, 3 (Eng.) ("[J]udges commissions [shall] be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them...."). Edward Coke had earlier stated his view regarding behavior justifying removal of a judge: abuse of office, nonuse of office, and refusal to perform duties. *Henry v. Barkley*, (1956) 79 Eng. Rep. 1223, 1224 (K.B.).

27. See NIEVES MATHEWS, FRANCIS BACON: THE HISTORY OF A CHARACTER ASSASSINATION (1996) (detailing the event and contending that Bacon was innocent).

28. *Id.* at 6.

presented, those writing constitutions for new American states<sup>29</sup> drew from the Act of Settlement the term, “good behavior” as the standard for the removal of a misbehaving judge.<sup>30</sup> The Founders also later used the term in Article III of the U.S. Constitution.<sup>31</sup>

The term “good behavior” had been in common usage in England at the time of the Act of Settlement,<sup>32</sup> but Article III of the Constitution, unlike the Act of Settlement, provides for *impeachment* in lieu of parliamentary *address* as the action to be taken by the legislature to remove a judge.<sup>33</sup> Address may reasonably be taken to impose less disapproval and humiliation on the addressee than does the term “impeachment.”<sup>34</sup> But Article III does not specify the standards of “good behavior” that would immunize a judge from impeachment and removal from office or distinguish the standard for removal by impeachment from the standard for removal by address.

Only in Article II does the Constitution specify “high crimes and misdemeanors” as the standard to be applied in a proceeding to impeach and remove an officer of the executive branch.<sup>35</sup> A question never definitively resolved is whether the Article II standard applies to the impeachment of an Article III judge, or, if so, what might constitute a misdemeanor for the purpose of removing one who holds office for the duration of his or her “good behavior.” Some federal judges speak of themselves as serving lifetime appointments; others more modestly say that they serve only as long as they are well-behaved.

There are clear differences between a judge and an executive officer that might seem to call for a difference in the standard to be applied by Congress when it considers its responsibility for removing an officer of an “equal branch” of the same government. Officers of the executive branch governed by Article II are subject to a

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29. *E.g.*, VA. CONST. (signed June 29, 1776).

30. RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 7 (1971).

31. U.S. CONST. art. III; *see also* Prakash & Smith, *supra* note 22, at 88.

32. *See* Prakash & Smith, *supra* note 22, at 88-128 (examining use of the term in eighteenth century England and in the colonies). *But see* James E. Pfander, *Removing Federal Judges*, 74 U. CHI. L. REV. 1227 (2007).

33. *Compare* U.S. CONST. art. III, *with* Act of Settlement of 1701, 12 & 13 Will. 3, c. 2, 3 (Eng.).

34. ALFINI ET AL., *supra* note 9, § 15.05.

35. U.S. CONST. art. II, § 4.



measure of accountability to the electorate and to the President, whereas Article III judges are not. An ill-behaved President will meet his or her doom on election day, whereas an ill-behaved federal judge will not. That is one reason that officers of the executive branch were not expected to maintain the disinterest required of the judge. Executive officers must be expected in the performance of at least some of their duties to respond to diverse influences that are certain to taint the purity of their motives in performing public service. For these sound reasons, the Founders probably intended to hold judges to a higher measure of accountability than Congress for official behavior that is “not good” even if it is not a “high crime or misdemeanor.”

Article III of the Constitution does not speak explicitly to the possibility of age or term limits imposed by law. It is widely assumed that such limits are not within the power of Congress.<sup>36</sup> We have elsewhere contended otherwise.<sup>37</sup> But merely assuring judges the “life tenure” of royalty, if the Constitution did so, hardly assured their fidelity to law anymore than it assured the king’s fidelity to law. The fidelity of judges to law requires strong self-restraint. That morality can dissolve if it is not reinforced by a moral climate maintained by the profession of which they are a part. And judges who lack “life tenure” can be expected to practice courageous fidelity to law in order to maintain the respect of the citizen-lawyers with whom they work and of the public they serve.

Thomas Cooley was a notable example of a judge greatly respected for his integrity. He won the respect of the profession and the public soon after he was elected in 1865 as the first Republican justice of the Supreme Court of Michigan.<sup>38</sup> One of the first opinions he wrote for his court cost several of his fellow Republicans the offices they thought they had won.<sup>39</sup> The case presented the question

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36. See, e.g., William Van Alstyne, *Constitutional Futility of Statutory Term Limits for Supreme Court Justices*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 385, 386 (Roger C. Cramton & Paul D. Carrington eds., 2006).

37. See generally REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (Roger C. Cramton & Paul D. Carrington eds., 2006); Roger C. Cramton, *Reforming the Supreme Court*, 95 CAL. L. REV. 1313 (2007).

38. See PAUL D. CARRINGTON, STEWARDS OF DEMOCRACY 55-68 (1999) (delivering an account of his chief justiceship).

39. *Id.* at 56.

whether Michigan's constitutional provision limiting the right to vote to state *residents* invalidated the legislative enactment that enabled Union soldiers on duty in the South to vote by mail.<sup>40</sup> Regretfully, he explained that departing from the plain meaning of the words of the state constitution would loosen "the anchor of our safety."<sup>41</sup> In deciding the case on the basis of a close formal reading of a preexisting text, Cooley's decision won the admiration of citizens of diverse politics as a signal of their court's integrity.<sup>42</sup>

But, alas, who can say for sure that Justice Cooley was not self-serving? Perhaps he sacrificed the jobs of his friends in order to win an accolade for himself. Would it have been a misreading of the statute to treat a soldier on temporary military duty in the South as still a "resident" of Michigan? Given our inevitable human failings, no judge, whether elected or appointed for life, can be expected to achieve perfection in suppressing all their impulses to behavior that is not "good." Law, at least in the United States, is no science. Citizen-lawyers therefore have a duty not only to reward with reverent respect those judges who, like Wythe and Cooley, overcome their self-serving and power-wielding instincts; they must also tolerate a reasonable measure of human failing by those appointed to practice the art of conforming their decisions to the expectations of their profession.

Still, power does corrupt. At some point on the variable scale of temptation, a judge's professional self-discipline fades. The Founders' vision imposes on Congress a duty to join in stripping judicial power from those who have succumbed to temptation or who are unable to perform their job.<sup>43</sup> As Lord Coke himself asserted, when it is clear that judges are not performing their offices or are using them for their own purposes, it is time that they be replaced.<sup>44</sup> And it is inevitably a task for the citizen-lawyer and the legal profession not only to support and defend judges whose conduct in

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40. *People v. Blodgett*, 13 MICH. 127, 163 (1865).

41. *Id.* at 173.

42. Cooley was nevertheless defeated in his campaign for reelection in 1885 as a result of a democratic landslide. For an account of that event, see George Edwards, *Why Justice Cooley Left the Bench: A Missing Page of History*, 33 WAYNE L. REV. 1563 (1987).

43. See U.S. CONST. art. II, § 2 (allowing for the impeachment of "all civil Officers of the United States").

44. See *supra* note 26.

office is within the limits of normal and expected human failings, but also to share responsibility when the time has come to punish or remove one who openly abuses or neglects the office. Moreover, one may reasonably infer from Article III that Congress has a constitutional duty to legislate reasonable standards of judicial conduct.<sup>45</sup>

Alas, self-interest infects the decisions of groups as well as individuals. Professions, like college fraternities or sororities, alumni groups, labor unions, or trade associations, are given to group advancement even if it is sometimes at the expense of the larger ideals of the American dream, such as the general public interest. To avoid betrayal of larger public interests, citizen lawyers and federal judges<sup>46</sup> need a healthy skepticism that cautions against the advancement of the legal profession at the expense of the public it is licensed to serve. The requisite sense of professional responsibility for the exercise of moral judgment on judicial conduct has sometimes been lacking even among the leadership of the profession.<sup>47</sup>

### 1. *The Federalists' "Ark of Safety"*

Members of the founding generation soon encountered the difficulties of judging the judges they had appointed for the period of their "good behavior." Notwithstanding the composition of the Continental Congress and the Constitutional Convention, there was in the late eighteenth century, a shortage of Americans who were "learned in the law." Many colonials trained in law had been loyalists and had fled to Canada or abroad early in the Revolution.<sup>48</sup> Those who remained were men of strong and conflicting political views. Although Tocqueville would, within a few decades, designate

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45. See U.S. CONST. art. III, § 1.

46. For reflection on the occasional tendency of federal judges collectively to share the human failing leading to self-aggrandizement, see William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975).

47. See *infra* notes 52-53, 86-103 and accompanying text.

48. MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876*, at 139 (1976) (noting that one-fourth of colonial lawyers fled in the "Tory exodus").

them as an American aristocracy of sorts,<sup>49</sup> their profession was not at all times highly regarded by other citizens.

Notwithstanding disclaimers in the Federalist Papers that the courts were the “least dangerous” branch of the new government,<sup>50</sup> it was soon widely recognized by others that American courts and the legal profession were, in the founding scheme, political institutions that were not concerned solely with the correct enforcement of preexisting legal rights.<sup>51</sup> The New Hampshire judiciary serves as a striking example of widespread mistrust of the legal profession. Some of that state’s judges made no pretense of being trained as lawyers. John Dudley, a farmer, was elected to the state’s supreme court and served from 1785 to 1797.<sup>52</sup> He urged jurors to disregard the talk of lawyers; he instructed them to “[b]e just and fear not.”<sup>53</sup> As far as the law was concerned, he said: “It is our business to do justice between the parties ... not by any quirks of the law out of Coke or Blackstone, books I never read, and never will, but by common sense and common honesty between man and man.”<sup>54</sup> In a famous charge to a jury, Justice Dudley said:

You have heard, gentlemen of the jury, what has been said in this case by the lawyers, the rascals! ... They talk of law. Why, gentlemen, it is not the law we want, but justice. They would govern us by the common law of England.... Common sense is a

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49. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 297-306 (Henry Reeve trans., 1966).

50. THE FEDERALIST NO. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

51. An eloquent statement of the problem published in 1848 is that of Frederick Grimké, a justice of the Ohio Supreme Court. FREDERICK GRIMKÉ, *CONSIDERATIONS UPON THE NATURE AND TENDENCY OF FREE INSTITUTIONS* 420, 420 (2d ed. 1968). Grimké concluded that

if it is not wise to confer a permanent tenure of office upon the executive and legislative,” he concluded, “it should not be conferred upon the judiciary; and the more so, because the legislative functions which the last perform is a fact entirely hidden from the great majority of the community.... The term of [judicial] office, therefore, should be long enough to enable the public to make a fair trial of the ability and moral qualities of the incumbent; and not so long as to prevent a removal in a reasonable time, if he is deficient in either.

*Id.*

52. 2 ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 42-43 (1965).

53. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 160 (2004).

54. *Id.*

much safer guide.... A clear head and an honest heart are worth more than all the law of all the lawyers.<sup>55</sup>

Nothing in the text of the Constitution prevented the appointment of Justice Dudley to the federal bench or to the Supreme Court. Could his jury instruction be viewed as sufficiently short of “good behavior” for a federal judge that he might be punished or removed from office in compliance with the text of Article III? Plainly in Justice Dudley’s court, “Law was not King.”<sup>56</sup> A judge or a Justice, sitting in a court of law, who intentionally and often disregards controlling legal texts in this way should be chastised. And those who should do the chastising are citizen-lawyers who lead their profession and whose political preferences might have been advanced by such judicial misconduct, although this has seldom happened.

The federal courts authorized by the Constitutional Convention in Philadelphia were intended in part to correct the indifference to law observable in the courts of some states.<sup>57</sup> But as David Currie described, the federal courts established by the Judiciary Act of 1789<sup>58</sup> soon became what he regarded as “the most endangered branch.”<sup>59</sup> This was so because some of the Federalist judges also manifested a disregard for law, if less openly than Justice Dudley.<sup>60</sup>

The structure of the original federal judiciary is pertinent to the issues presented. The 1789 Act established the Supreme Court as a body of six Justices.<sup>61</sup> A district court was established for each of the thirteen states and one judgeship was created for each district court.<sup>62</sup> Those courts were authorized to hear and decide admiralty

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55. MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876*, at 57 (1976) (quoting Justice Dudley); *see also* WILLIAM PLUMER, JR., *LIFE OF WILLIAM PLUMER* 154 (1857). Justice Dudley’s jurisprudence had an English ancestry in the utterances of the Levellers. *See* CHRISTOPHER HILL, *THE INTELLECTUAL ORIGINS OF THE ENGLISH REVOLUTION REVISITED* 230-32 (1997).

56. *See supra* note 55 and accompanying text.

57. *See* THE FEDERALIST NO. 78, *supra* note 51.

58. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

59. DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829*, at 11-38 (1997).

60. *See id.* for a discussion of the failings of Judge Pickering and Justice Chase.

61. Judiciary Act of 1789 § 1.

62. *Id.* § 2.

cases, minor criminal cases, and a few other matters.<sup>63</sup> Three circuit courts, each serving multiple states, were created to exercise appellate jurisdiction over the district courts, and original jurisdiction in civil diversity cases, major criminal cases, and those in which the United States was a party.<sup>64</sup> Each circuit court was to be staffed by two of the six Justices and one of the district judges from within the circuit;<sup>65</sup> Justices were thus required to be itinerant in a time when their travel was by horse, wagon, or sailing vessel. The apparent purpose of this arrangement was to reduce the risk of self-advancing, lawless decisions in trial courts by submitting cases to three judges, not one. The full Supreme Court was to hear appeals from circuit court decisions only in those civil cases in which the amount in controversy exceeded two thousand dollars and from decisions of the highest state courts in cases raising federal questions.<sup>66</sup>

In the early decades of the new nation, the people to be governed had scant personal contact with this federal judiciary, and this would long remain so. All early federal courts had very short dockets.<sup>67</sup> Few citizens of moderate means found occasion to invoke either the diversity or admiralty jurisdictions. There were very few federal criminal laws to be enforced, but their enforcement often resulted from politically heated matters.

The Constitution forbade treason,<sup>68</sup> reflecting the Founders' concern about the loyalty of a diverse and disconnected citizenship. That concern was soon validated when citizens in the part of North Carolina that later became the state of Tennessee declared the

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63. *Id.* § 9.

64. *Id.* § 6.

65. *Id.* § 4.

66. *Id.* § 13.

67. During its first three years, the Supreme Court did not decide a single case. The Court decided only about fifty cases during its first decade. See ROBERT A. CARP & RONALD STIDHAM, *THE FEDERAL COURTS* 6-7 (4th ed. 2001). Reliable data on docket size prior to 1904 is not available. See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 53-55 (1996). President Jefferson's estimate of the total business of the circuit courts from their creation to the close of 1801 was 8358 Causes Instituted and 1629 Causes "Depending." FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 12-13 n.35 (1928).

68. U.S. CONST. art. III, § 3, cl. 1. Article III defines treason against the United States to "consist only in levying war against them, or in adhering to their enemies, giving them aid or comfort." *Id.* Article III also provides that "[n]o Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." *Id.*

independence of their State of Franklin and sought the protection of the King of Spain.<sup>69</sup> The leader of that effort would not only escape prosecution, but would also be elected the first Governor of Tennessee.<sup>70</sup>

Also among the early treason prosecutions were those resulting from the Whiskey Rebellion of 1791-94.<sup>71</sup> Farmers in several states, who protested a federal tax on the sale of their one marketable product, conducted the insurrection.<sup>72</sup> The rebellion was most bitter in western Pennsylvania; President Washington and the Secretary of the Treasury, Alexander Hamilton, led an army to suppress the uprising.<sup>73</sup> Two participants found to have been violent were convicted of treason, but were later pardoned by the President.<sup>74</sup>

In 1794, Congress, concerned about citizens embarking on private invasions of Florida and Louisiana, enacted a presidential proclamation known as the Neutrality Act.<sup>75</sup> It prohibited citizens from “invading and plundering the territories of a nation at peace with the United States.”<sup>76</sup> That prohibition was frequently violated. In 1796, William Blount, a Jeffersonian Senator who represented the new state of Tennessee, was impeached by Federalist adversaries.<sup>77</sup> He was charged with actively inciting Creek and Cherokee Indians to assist the British in conquering the Spanish territory of West Florida in alleged violation of the 1794 Act.<sup>78</sup> Blount was expelled by a 25-1 vote of the Senate,<sup>79</sup> but before the impeachment was

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69. ROBERT E. CORLEW, *TENNESSEE: A SHORT HISTORY* 79-81 (1981).

70. MARY FRENCH CALDWELL, *TENNESSEE: THE DANGEROUS EXAMPLE, WATAUGA TO 1849*, at 181-83, 209 (1974) (explaining John Sevier's rise to power in Tennessee).

71. See JOHN CARROLL ELLIOTT & ELLEN GALE HAMMETT, *CHARGED WITH TREASON, JURY VERDICT: NOT GUILTY* (1986), for a fictionalized account of the 1807 trial of Colonel Aaron Burr, who stood accused of treason.

72. See generally WILLIAM HOGELAND, JR., *THE WHISKEY REBELLION: GEORGE WASHINGTON, ALEXANDER HAMILTON, AND THE FRONTIER REBELS WHO CHALLENGED AMERICA'S NEWFOUND SOVEREIGNTY* (2006).

73. *Id.* at 186-89.

74. *Id.* at 190.

75. Neutrality Act of 1794, ch. 50, 1 Stat 381.

76. JAMES ROGER SHARP, *AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS* 107 (1993).

77. See generally BUCKNER F. MELTON, JR., *THE FIRST IMPEACHMENT: THE CONSTITUTION'S FRAMERS AND THE CASE OF SENATOR WILLIAM BLOUNT* (1998).

78. *Id.*

79. *Id.* at 125.

resolved, he fled to Tennessee.<sup>80</sup> Later, he presided over Tennessee's legislature and was never prosecuted.<sup>81</sup> Neither was Alexander Hamilton, who in 1800 was openly planning a seizure of New Orleans that was not approved by the Adams administration.<sup>82</sup>

Meanwhile, in 1793, Congress enacted a change to the Judiciary Act to respond to the Justices' complaints about the burdens of "circuit riding" resulting from their duty to attend the occasional proceedings in distant courts.<sup>83</sup> The change cut the burden on each Justice by one-half, not by appointing more judges to handle the small caseload, but by reducing the number of Justices expected to sit on the circuit courts from two to one. As a consequence, circuit courts became two-judge courts with the itinerant Justice presiding.<sup>84</sup> The district judge sitting with the Justice usually assumed a modest role unless the sitting Justice chose to defer to his lesser colleague.

In 1794, the bar and the public recognized that District Judge John Sullivan was insane or at least too alcoholic to attend court.<sup>85</sup> The first judge appointed to the federal district court in New Hampshire by President Washington, he had twice served as governor of that state.<sup>86</sup> To correct his unfortunate situation, Congress took the questionable step of transferring all the jurisdiction of his district court to the circuit court for his region.<sup>87</sup> But Sullivan was not impeached, and he remained on the federal payroll as a judge of a court lacking jurisdiction.<sup>88</sup>

Upon the death of Judge Sullivan, Congress reestablished the jurisdiction of the district court for New Hampshire,<sup>89</sup> and the position was given to John Pickering, a former member of the Constitutional Convention and, at the time, chief justice of the state

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80. *Id.* at 127.

81. *Id.* at 76, 231-32.

82. ROGER G. KENNEDY, *BURR, HAMILTON AND JEFFERSON: A STUDY IN CHARACTER* 136-38 (2000).

83. *See* Judiciary Act, 1 Stat. 333 (1793).

84. *See* Act of March 2, 1793, ch. 22, 1 Stat. 333.

85. DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801*, at 198-200 (1997).

86. *Id.*

87. *See* Act of April 3, 1794, ch. 16, 1 Stat. 352; *see also* CURRIE, *supra* note 85, at 199.

88. *See* CURRIE, *supra* note 85, at 199-200.

89. *See supra* note 85.



and thus a colleague of Judge Dudley.<sup>90</sup> At the time of his appointment to the federal bench, efforts had been mounted by New Hampshire lawyers to remove Judge Pickering (but not Judge Dudley) from his office on the state court for the same reason of his insanity.<sup>91</sup> His condition may also have been associated with alcoholism or perhaps with superannuation.<sup>92</sup> An attempt to remove him from office in the state court had failed by one vote in the New Hampshire House of Representatives.<sup>93</sup> The cause for concern about his work habits as his state's chief justice was set aside in the belief that he could bear the very light workload of the federal district court.<sup>94</sup> So he was appointed by President Washington to a federal judgeship in order to relieve the New Hampshire bar and legislature of a problem.<sup>95</sup>

A similar series of events marked the career of Samuel Chase. While representing Maryland in the Continental Congress during the Revolution, Chase had compromised military secrets for personal gains in the flour market.<sup>96</sup> This misconduct deprived him of his role in that Congress.<sup>97</sup> In 1788, after the war, Chase, despite his misdeed, was appointed to head Maryland's criminal court in Baltimore.<sup>98</sup> But in 1794, he was indicted by a Maryland grand jury for abusing his judicial authority.<sup>99</sup> Alexander Hamilton said of him at the time that he had "the peculiar privilege of being universally despised."<sup>100</sup> But his indictment never came to trial. Instead, he was appointed by President Washington to the Supreme Court of the United States.<sup>101</sup> Chase's appointment, like that of Pickering, was

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90. See CURRIE, *supra* note 85, at 200 n.207.

91. See *id.*

92. See 1 HENRY ADAMS, *THE FORMATIVE YEARS* 193 (Herbert Agar ed., 1948).

93. RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 70 (1971).

94. *Id.*

95. *Id.*

96. JAMES HAW, FRANCIS F. BEIRNE, ROSAMOND R. BEIRNE & R. SAMUEL JETT, *STORMY PATRIOT: THE LIFE OF SAMUEL CHASE* 105-08 (1980). The person who first revealed his misdeeds to the public was Publius, the pen name of Alexander Hamilton. RON CHERNOW, *ALEXANDER HAMILTON* 118 (2004).

97. *Id.* at 108.

98. HAW, *supra* note 96, at 162.

99. *Id.* at 173.

100. CHERNOW, *supra* note 96, at 118.

101. CURRIE, *supra* note 59, at 32; HAW ET AL., *supra* note 96, at 176.

apparently made at the request of local lawyers who perceived that he would do less harm, at least to themselves and to the people of Maryland, if he served on a distant multi-judge federal court, in which he might be less free to indulge inappropriate impulses.<sup>102</sup>

For a time the behaviors of both Judge Pickering and Justice Chase gave rise to no serious complaints, but Chase's self-control dissolved when he conducted trials of defendants accused of holding and expressing political views contrary to his own.<sup>103</sup> The potential role of federal judges as Federalist political partisans was exposed for all to see.

In 1798, the Federalist Congress, anticipating war with France, enacted four laws designated as the Alien and Sedition Acts.<sup>104</sup> And in 1799, concerned about citizens negotiating private trade relationships with France, Congress prohibited negotiations with other nations on behalf of the United States without authorization.<sup>105</sup> Chase and many of his fellow Federalists perceived themselves as a deservedly ruling class and many reacted strongly against the ongoing class struggle in France as one indirectly threatening to themselves.<sup>106</sup> The Sedition Act proscribed, among other misdeeds, speech disrespectful of themselves as public officeholders, but not speech disrespectful of Vice President Jefferson, who happened not to be a Federalist.<sup>107</sup>

Chase presided over the case of Thomas Cooper, an English immigrant charged with criminal sedition.<sup>108</sup> Cooper was eminent both as a physician and as a lawyer and was also a journalist in Pennsylvania.<sup>109</sup> He supported the presidential candidacy of Jefferson and had published an unflattering account of President

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102. See HAW ET AL., *supra* note 96, at 175-76 for an account of Chase's appointment to the bench, including both statements of praise and misgiving by his fellow legislators.

103. *Id.* at 191-208.

104. The Naturalization Act of June 18 would be repealed in 1802. Act of June 18, 1798, ch. 54, 1 Stat. 566. The Alien Friends Act of June 25 expired after two years in force. Act of June 25, 1798, ch. 58, 1 Stat. 570. The Alien Enemies Act of July 6 remains in force. Act of July 6, 1798, ch. 66, 1 Stat. 577. The Sedition Act of July 14 expired on March 3, 1801. Act of July 14, 1798, ch. 74, 1 Stat. 596.

105. See The Logan Act, ch. 1, 1 Stat. 613 (1799) (codified at 18 U.S.C. § 953).

106. See HAW, *supra* note 96, at 193-95.

107. See Act of July 14, 1798, ch. 74, 1 Stat. 596.

108. See DUMAS MALONE, *THE PUBLIC LIFE OF THOMAS COOPER 1783-1839*, at 121-30 (1926).

109. See *id.*

Adams.<sup>110</sup> In Cooper's trial, Justice Chase went beyond the contentions of the prosecutor, and, in open disregard of common law standards,<sup>111</sup> informed the jury that Cooper was guilty.<sup>112</sup> Then, with the assent of the subordinate district judge, he sentenced Cooper to six months in jail, a judgment not subject to appellate review.<sup>113</sup>

Justice Chase then presided over the trial of John Fries, who was indicted for *treason* for impeding the efforts of federal tax collectors.<sup>114</sup> The tax that Fries and others protested was the Direct House Tax on houses, land, and slaves enacted to pay for national defense against a French invasion that some Federalists anticipated.<sup>115</sup> Congress imposed the tax in 1798, along with the Alien and Sedition Acts.<sup>116</sup> It was called a "window tax" because the tax liability of homeowners in nonslave states was measured by the size of their windows.<sup>117</sup> The dispute over the tax was also known as a "hot water war" because some women poured water from their second floor windows on tax collectors who came to their front doors.<sup>118</sup>

In 1794, Fries had participated in the Whiskey Rebellion.<sup>119</sup> Later, in 1799, he led a group of sixty armed men who threatened the tax collectors seeking to enforce the Direct House Tax.<sup>120</sup> He imprisoned three revenue agents overnight and seized their

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110. *Id.* at 105, 119-21.

111. See generally 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 342, 354-55 (1769); 5 WILLIAM BLACKSTONE, COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND THE LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 361 (St. George Tucker ed., Augustus M. Kelley 1969) (1803) (discussing the right to have a jury freely determine a verdict, rather than at the order of the judge, "for, if the judge's opinion must rule the verdict, the trial by jury would be useless").

112. MALONE, *supra* note 108, at 126-29.

113. *Id.*

114. ELLIS, *supra* note 93, at 77-78; FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 637-41 (1849).

115. See Direct Tax Act of 1798, ch. 75, 1 Stat. 597.

116. See *id.*; *supra* note 105 and accompanying text.

117. W.R. Ward, *The Administration of the Window and Assessed Taxes, 1696-1798*, 67 ENG. HIST. REV. 522 (1952).

118. PAUL DOUGLAS NEWMAN, FRIES'S REBELLION: THE ENDURING STRUGGLE FOR THE AMERICAN REVOLUTION 13 (2004).

119. Marjorie E. Kornhauser, *Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America*, 50 BUFF. L. REV. 819, 850 n.70 (2002).

120. NEWMAN, *supra* note 118, at 139-40.

papers.<sup>121</sup> When some of his men were in turn imprisoned, Fries led an armed posse to the United States Marshal's office; the intimidation secured their release.<sup>122</sup> President Adams ordered the Army to take control, and in 1799, it succeeded in arresting Fries, along with forty others.<sup>123</sup> When charged with treason, he admitted the factual allegations, but denied disloyalty to the United States.<sup>124</sup> In the trial, Justice Chase refused to allow Fries's lawyers to argue to the jury that his actions were not treason and the lawyers accordingly withdrew from the case. Their client was then convicted and Chase sentenced him to death.<sup>125</sup> President Adams, appalled by Chase's conduct, pardoned Fries.<sup>126</sup>

In an 1800 case, James Callendar was charged with sedition for his denunciation of President Adams.<sup>127</sup> Justice Chase refused to excuse a juror who acknowledged before trial his certainty of Callendar's guilt.<sup>128</sup> Without giving a reason, he refused to allow the defendant's principal witness, John Taylor of Caroline, a notable Jeffersonian, to testify.<sup>129</sup> Chase was also reported to have interrupted, badgered, and insulted defense counsel.<sup>130</sup>

For these and perhaps other reasons, Chase was indeed much despised. He was disowned by President Adams when he campaigned for reelection in 1800.<sup>131</sup> An effort to remove Justice Chase or to constrain him from his extreme partisan misconduct and brutality was never mounted by the Federalists in Congress or by the (Federalist) Attorney General. Meanwhile, also in 1800, Judge

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121. *Id.*

122. *Id.* at 140.

123. *Id.*

124. HAW, *supra* note 96, at 200-02.

125. *Id.* at 202.

126. Richard Ellis, *The Impeachment of Samuel Chase*, in AMERICAN POLITICAL TRIALS 57-76 (Michael R. Belknap ed., 1981). *But see generally* Stewart Jay, *The Rehabilitation of Samuel Chase*, 41 BUFF. L. REV. 273 (1993) (reviewing Stephen B. Presser, *THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE* (1991)).

127. *Id.* at 202-03.

128. WHARTON, *supra* note 114, at 695-97.

129. JAMES MORTON SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* 352-53 (1956).

130. *Id.* at 346-49, 352-55.

131. Letters, *John Adams to John Marshall, 30 July and 7 August 1800*, in 9 THE WORKS OF JOHN ADAMS 66, 71-72 (Charles Francis Adams ed., 1969) (1853).

Pickering again became a frequent absentee from work.<sup>132</sup> His clerk reported to the circuit court that he had become insane and was not performing his job.<sup>133</sup>

These events helped Jefferson's party—then known as the Democratic-Republican Party<sup>134</sup>—sweep the Federalists out of most elective offices, except for those serving in New England.<sup>135</sup> But the outgoing Federalist Congress and President Adams addressed the reality of their defeat in the first weeks of 1801 with the Midnight Judges Act.<sup>136</sup> That Act added sixteen circuit judgeships (one for each state); these judges would sit on the circuit courts with jurisdictions extended to the constitutional limit.<sup>137</sup> The Act also reduced the number of Justices from six to five.<sup>138</sup> But before that provision took effect, a sixth Justice, John Marshall, was appointed and confirmed, apparently in the hope that this overstaffing would prevent the incoming President from making any appointment to the Court.<sup>139</sup> And all the new judgeships were quickly filled with loyal Federalists who had lost their offices in the election.<sup>140</sup>

Federalist Gouverneur Morris explained that his party was “about to experience a heavy gale of adverse wind.”<sup>141</sup> Therefore, he asked, “Can they be blamed for casting many anchors to hold their ship through the storm?”<sup>142</sup> Martin Van Buren, no admirer of Morris, later referred to this event as the creation of an “ark of future safety” for Federalist politicians.<sup>143</sup> Felix Frankfurter and James

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132. See Kathryn Turner, *The Midnight Judges*, 109 U. PA. L. REV. 494, 497 (1960).

133. *Id.*

134. See, e.g., William Josephson & Beverly J. Ross, *Repairing the Electoral College*, 22 NOTRE DAME J. LEGIS. 145, 155-56 (1996).

135. *Id.*

136. Act of Feb. 13, 1801, 2 Stat. 89, § 25. By then district courts had been established in North Carolina, Rhode Island, and Vermont, so that there were sixteen district courts each served by two judges. William E. Swindler, *Judicial Potpourri—The Numbers Game*, 1977 J. SUP. CT. HIST. 86, 87-89; see also ELLIS, *supra* note 93, at 15. For further analysis and comment, see generally Turner, *supra* note 132.

137. ELLIS, *supra* note 93, at 15.

138. *Id.*

139. JEAN EDWARD SMITH, JOHN MARSHALL: A DEFINER OF A NATION 279 (1996).

140. See Turner, *supra* note 132, at 521-22.

141. ELLIS, *supra* note 93, at 15 (quoting THE LIFE OF GOVERNEUR MORRIS 153-54 (Jared Sparks ed., 1832)).

142. ELLIS, *supra* note 93, at 15.

143. MARTIN VAN BUREN, INQUIRY INTO THE ORIGIN AND COURSE OF POLITICAL PARTIES IN THE UNITED STATES 278 (Augustus M. Kelley Publishers 1967) (1867).

Landis later concluded that the 1801 Act “combined thoughtful concern for the federal judiciary with selfish concern for the Federalist party.”<sup>144</sup> What Frankfurter and Landis probably had in mind as an expression of “thoughtful concern for the federal judiciary” were the Act’s provisions putting an end to so-called circuit riding by Justices and empowering the new circuit judges to disqualify a district judge from deciding cases if they found him to be incapacitated.<sup>145</sup> This power was promptly exercised to move Judge Pickering into a state of compensated retirement.<sup>146</sup>

Given the partisan self-serving effect of the Midnight Judges Act, its repeal by the new Democratic-Republican Congress came as no surprise.<sup>147</sup> But the repeal drew criticism from St. George Tucker, the first scholar of constitutional law and a supporter of President Jefferson.<sup>148</sup> He argued that it was unconstitutional to terminate sixteen well-behaved district judges by simply abolishing their judgeships.<sup>149</sup> The Act, he said, threatened “the fundamental pillars of free governments” by threatening the job security and independence of judges.<sup>150</sup> His argument was considered and rejected by both Houses of Congress and by the President. In 1779, David Currie gave a somewhat diffident endorsement to Tucker’s protest; he concluded that “[f]inding new places for a few extra judges may be a fair price to pay for judicial independence.”<sup>151</sup>

Had the Act of 1801 creating those offices been less audacious, and had there been any need for the additional judges, the arguments of Tucker and Currie might have greater force.<sup>152</sup> But they

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144. FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 25 (1928).

145. *Id.*; see also Act of Feb. 13, 1801, 2 Stat. 89, § 7.

146. ELLIS, *supra* note 93, at 70.

147. See Act of Mar. 8, 1802, 2 Stat. 132.

148. 1 BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, *supra* note 112, at 360-61.

149. *Id.*

150. *Id.*

151. CURRIE, *supra* note 59, at 22.

152. Congress honored the argument when it abolished the short-lived Commerce Court, but there were only five judges on that court and four were easily assimilated into the other federal courts. The fifth, Robert W. Archbald, was removed from office by the Senate. See Commerce Court, 1910-1913, Federal Judicial Center, [http://www.fjc.gov/history/home.nsf/page/commerce\\_bdy](http://www.fjc.gov/history/home.nsf/page/commerce_bdy) (last visited Feb. 18, 2009).

disregard the larger context of the Midnight Judges Act, which was an insult to the integrity of the nascent federal judiciary because the Act was used for the personal advantage of the judges they appointed. That legislation, it is important to emphasize, was enacted after the Federalists had already lost the election.<sup>153</sup> Its manifest purpose had nothing to do with the duty of Congress and the President to maintain an independent judiciary or secure faithful enforcement of law, but was quite the opposite; its self-dealing was intended to capture offices in the federal judiciary for rejected officeholders.<sup>154</sup> To preserve the judicial offices newly created under those prevailing circumstances would have served as an acceptance of the right of lame duck Congressmen to use the judicial branch, not only as a place of employment of defeated politicians, but for the purely political aim of prolonging their unwelcome political influence.<sup>155</sup> The forceful contrary argument is that citizen-lawyers defending the integrity of the judiciary should have insisted, as many did, on the repeal of the unseemly Act of 1801.

Although that repeal had the perhaps unintended effect of restoring Judge Pickering to the bench,<sup>156</sup> no judge was punished for making a substantive decision disapproved by Congress.<sup>157</sup> Tucker in his 1803 treatise, notwithstanding his previously expressed concern about the Act of 1802, celebrated the federal Constitution as the first to recognize the “absolute independence of the judiciary” as “one of the fundamental principles of the government.”<sup>158</sup> He optimistically explained that “the violence and malignity of party spirit, as well in the legislature, as in the executive, requires not less the intervention of a calm, temperate, upright, and independent judiciary.”<sup>159</sup> Congress rightly presented the 1802 Act as legislation to reinstate the integrity of the federal judiciary. No Congress has since been tempted to enact corrupt legislation of the 1801 sort. If

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153. See TURNER, *supra* note 132, at 494-96.

154. *Id.*

155. *See id.*

156. See ELLIS, *supra* note 93, at 70.

157. See 3 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 165, 199-222 (1929).

158. ST. GEORGE TUCKER, *VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS* 290 (1999). This book is a belated republication of Tucker's major additions to the 1803 edition of the supplement to his Americanized edition of *Blackstone's Commentaries on the Laws of England*.

159. *Id.* at 291.

one should do so, the task for citizen-lawyers and their bar organizations would be to secure its repeal.<sup>160</sup>

*B. Removing a Disabled Judge: The Pickering Case*

In 1803, animated in part by overbearing conduct by the remaining Federalist judges, who were proclaimed to be “partial, vindictive, and cruel,”<sup>161</sup> the Jefferson administration set about the task of removing what some reckoned to be an excess of Federalists among the federal judiciary whose behavior was thought to be less than good.<sup>162</sup>

President Jefferson’s initial step was to recommend Judge Pickering’s removal.<sup>163</sup> Congress impeached him for drunkenness and unlawful rulings in an admiralty case involving the ship *Eliza*.<sup>164</sup> In that case, Pickering had ordered the marshal to release the ship to its owners, who were fellow Federalists, despite the nonpayment of duties it owed—a default exposing the ship to lawful seizure.<sup>165</sup> When the United States Attorney pointed out that Judge Pickering had not yet heard the government’s witnesses, he was said to have announced drunkenly that “[y]ou may bring forty thousand [and] they will not alter the decree.”<sup>166</sup> He was also accused of committing unspecified “high crimes and misdemean-

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160. As an example, the Commerce Court was established in 1910 at the behest of President Taft, with the jurisdiction to review decisions of the Interstate Commerce Commission. FRANKFURTER & LANDIS, *supra* note 144, at 156, 161-62. It was “launched in unfavorable winds” and “encountered a heavy sea,” seen as a target and prisoner of interest groups. *Id.* at 162. Taft vetoed its abolition in 1912, *id.* at 169-70, but it was abolished in 1913, after he left office. *Id.* at 171-73. Four members of the court were retained as full-time, sometimes itinerant members of the federal judiciary. The story is fully told by FRANKFURTER & LANDIS, *supra* note 144, at 156-73; see also Philip B. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665, 683-86 (1969).

161. 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 191 (1926); see generally *id.* at 187-230.

162. ELLIS, *supra* note 93, at 70-77, 80-81, 83; see also 2 GEORGE LEE HASKINS & HERBERT A. JOHNSON, *THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15*, at 205-45 (1981).

163. ELLIS, *supra* note 93, at 71.

164. *Id.* at 70-71.

165. *Id.*

166. *Id.* at 70. For a full account, see generally Lynn Tucker, *The Impeachment of John Pickering*, 54 AM. HIST. REV. 485 (1949).



ors.”<sup>167</sup> The defense contended that his insanity disabled him from entertaining the criminal intent required to find him guilty of a high crime or misdemeanor.<sup>168</sup> In response to that defense, the Senate agreed to strike the reference to high crimes, but then found him guilty on all counts of behavior that was not sufficiently good, and removed him from office.<sup>169</sup>

The Federalists had contended that the Article II language requiring proof of “high crimes or misdemeanors” applicable to impeachment and removal of executive officers was by implication applicable as well to Judge Pickering.<sup>170</sup> The Senate’s ruling that an Article III judge can be removed for misconduct not rising to “high crimes or misdemeanors,” whatever those words might be taken to mean, stands out, but no federal judge has since been impeached and removed who was not also found guilty of criminal misconduct.

No worthy government then or now should require its citizens to submit their disputes for resolution by a drunken Judge Pickering. Indeed, it is manifestly a violation of the Due Process Clause of the Fifth Amendment to subject a citizen to the power of such judges.<sup>171</sup> If, as Article III provides, impeachment and removal by Congress is the only available means of assuring the rights of citizens to have their cases competently decided, then such judges must be impeached. Notwithstanding the enduring practice of referring to Article III judges as officers enjoying “life tenure,” they do not have a right to remain in offices that entail duties they cannot or will not perform.<sup>172</sup> They may serve only for the period of their “good behavior.”<sup>173</sup>

It was clearly unnecessary, however, to impeach and remove Judge Pickering. The repealed Act of 1801 provided an unobjectionable means for removing him, and there existed no sufficient reason to repeal that provision, or at least not to devise an alternative method of achieving the humane result of retiring disabled judges gently, in a nonpunitive manner. On that point, Currie is surely

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167. ELLIS, *supra* note 93, at 72.

168. *Id.* at 72-73; *see also* BEVERIDGE, *supra* note 157, at 166.

169. ELLIS, *supra* note 93, at 74.

170. HASKINS & JOHNSON, *supra* note 162, at 211-15.

171. JOHNNY H. KILLIAN ET AL., *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION* 1434-1435 (2004).

172. *See* HASKINS & JOHNSON, *supra* note 162, at 212.

173. ELLIS, *supra* note 93, at 75.

right that the cost of Judge Pickering's salary is a price worth paying to avoid a use of the impeachment power to remove a judge whose misconduct is not sinister but rather the product of his ill health.<sup>174</sup>

The failure of Congress in 1802 to address the problem of superannuated and otherwise nonperforming judges imposed burdens and the risk of injustice on randomly selected litigants and lawyers. Given the system of judicial selection established by Article III,<sup>175</sup> it was inevitable and obvious that some judges would, like Pickering, hold their offices long after they were intellectually and emotionally fit to perform the work. And in 1802, it was surely already known that power tends to corrupt and reinforce the selfish or brutal instincts of those on whom it is conferred. But oversight of judicial conduct was left to the appellate process conducted by the itinerant Justices of the Supreme Court. And not until 1889 was there even a right of appeal in a criminal case.<sup>176</sup> For a century, federal cases were decided by judges who were often unaccountable for their rulings, and some of whom were surely disabled and unfit. It was fortunate that few rights of most citizens in the nineteenth century depended on their enforcement by federal judges.

In 1891, Congress did at last get around to creating the courts of appeals.<sup>177</sup> The legislation was celebrated by its congressional proponent as a law ending "the kingly power" of federal judges.<sup>178</sup> Until then, the only court reviewing judgments in civil cases was the Supreme Court with its ever-expanding docket.<sup>179</sup> A half-century of agitation by able and committed citizen-lawyers such as Senator Evarts and Congressman Culberson was required to persuade

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174. David P. Currie, *The Constitution in Congress: The Most Endangered Branch, 1801-1805*, 33 WAKE FOREST L. REV. 219, 257-58 (1991).

175. U.S. CONST. art. III, § 1.

176. The Act of Feb. 6, 1889, 25 Stat. 655, provided for appeals, but only in capital cases. See FRANKFURTER & LANDIS, *supra* note 67, 109-13.

177. See Act of Mar. 3, 1891, 26 Stat. 826.

178. He acknowledged "a supreme desire to witness during my time in Congress the overthrow and destruction of the kingly power of district and circuit judges." 21 CONG. REC. 3404 (1890). "Kingly power" was in part a feature of the solitude of the single district judge presiding over his district. See PETER GRAHAM FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 3-17 (1973).

179. FRANKFURTER & LANDIS, *supra* note 67, at 56-64, 69.

Congress to establish a right of appeal in criminal cases and a forum capable of reviewing judgments in civil cases.<sup>180</sup>

Even in the twentieth century with appellate courts in place to oversee the exercise of “kingly power,” decrepit or emotionally disordered judicial behavior occurred, as well as the occasional open disregard of the applicable law. The recent biography of Judge Willis Ritter of the Utah District Court tells a tale less extraordinary than many might choose to believe.<sup>181</sup> Ritter was appointed in 1950.<sup>182</sup> The son of a Utah coal miner, he had been a law professor at the University of Utah and held a high position in the regional Office of Price Administration during World War II.<sup>183</sup> Former law professors at Chicago and Harvard recommended Ritter, and he had prospered in private practice as a tax and estates lawyer, in addition to serving as political patron and advisor to Utah’s senior United States Senator, a New Deal Democrat.<sup>184</sup> These credentials almost entitled him to judicial office by the standards of the day.<sup>185</sup> His appointment by President Truman was indirectly opposed by the Mormon hierarchy and by Utah’s junior United States Senator, a Republican, who launched a serious campaign against his nomination—based centrally on allegations that, over the years, he had expressed disapproval of the Constitution and even expressed Communist sentiments.<sup>186</sup> It was also asserted that he had not been faithful to his wife, and had sometimes manifested a bad temper.<sup>187</sup>

Ritter was confirmed, but his ill temper was seemingly magnified by the experience. He proved over the years to be an increasingly abusive judge who insulted and degraded court staff and the post office employees with whom he shared a federal office building.<sup>188</sup> He was also brutal in his dealings with lawyers and litigants, and even with fellow federal judges. In 1954, Judge Ritter’s critics, to lessen his power over them, secured the appointment of a second

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180. The story is told in FRANKFURTER & LANDIS, *supra* note 67, at 56-102, 89-93, 98-102.

181. See generally PATRICIA F. COWLEY & PARKER M. NIELSEN, THUNDER OVER ZION: THE LIFE OF CHIEF JUDGE WILLIS W. RITTER (2006).

182. *Id.* at 156-58.

183. See *id.* at 3, 32, 59.

184. *Id.* at 64-65.

185. *Id.*

186. *Id.* at 108-13, 116-24, 126-27.

187. *Id.* at 96-97, 130.

188. *Id.* at 162-63, 180-81.

district judge notwithstanding the fact that he had kept a current docket.<sup>189</sup> He strongly resented his “little helper” and attempted to minimize the role of his colleague through the exercise of his powers as chief judge.<sup>190</sup>

Judge Ritter’s personal life also withered. He was brutal in his disapproval of his daughter’s marriage, and when his wife chastised him he brought a “girlfriend” to the family farm to meet the family.<sup>191</sup> Though his loyal wife did not divorce him, a formal separation agreement forced him to leave their home and live alone.<sup>192</sup> First, he lived in the local University Club, but he was expelled for drunkenly punching the crippled manager for refusing to serve him another drink after hours.<sup>193</sup> Then, he moved into a hotel room across the street from the courthouse.<sup>194</sup> He was also given to public urination and womanizing.<sup>195</sup>

By 1972, the mayor of Salt Lake City was prepared to attest that Judge Ritter was biased against the city.<sup>196</sup> In 1976, the Utah Bar Association was asked to vote to call for Judge Ritter’s removal from office.<sup>197</sup> The contrary prevailing argument was that his removal would impair the independence of the judiciary.<sup>198</sup> But the bar did agree that his powers as chief judge should not be retained.<sup>199</sup> Soon thereafter, both the State of Utah and the United States Department of Justice moved to disqualify him from sitting on any case to which that government was party.<sup>200</sup> When critics were heard to call for his removal, he likened himself to Edward Coke.<sup>201</sup>

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189. *Id.* at 200.

190. *Id.* at 200-01.

191. *Id.* at 184-85.

192. *Id.*

193. *Id.* at 254.

194. *Id.* at 248-49.

195. *Id.* at 155.

196. *Id.* at 271.

197. *Id.* at 274, 276-77.

198. *Id.* at 279.

199. *Id.*

200. *Id.* at 288-89.

201. *Id.* at 280.

Eminent authors David Currie<sup>202</sup> and Martin Redish<sup>203</sup> have concluded—from two centuries of Congressional self-restraint in the exercise of the impeachment power—the principle that the Article II standard (high crimes or misdemeanors) applies to Article III impeachments.<sup>204</sup> Saikrishna Prakash and Steven Smith have lately and correctly taken a contrary view, arguing that Congress may remove a judge whose behavior it deems to be less than good.<sup>205</sup> Those authors, much more questionably, encourage Congress to provide a procedure other than impeachment to exercise that responsibility independently of the removal power.<sup>206</sup>

Congress, in due course, took an intermediate position by gradually delegating increasing power to the federal judiciary to govern itself with respect to misconduct by its officers. Reform began in 1922 when Congress created the Judicial Conference of the United States,<sup>207</sup> a body that gradually came to exercise substantial power over judicial matters.<sup>208</sup> The Conference has emerged as the institution responsible for dealing with disabled or unfit judges.<sup>209</sup> On its advice, other reforms followed.<sup>210</sup>

The problems posed by decrepitude were at last eased in 1939 by allowing judges or Justices who certified their disability to retire from regular active duty if their certification was signed by their chief judge or Justice of the circuit.<sup>211</sup> Those who have served for less

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202. See CURRIE, *supra* note 59, at 28-38. Currie, like many other constitutional scholars over the ensuing centuries, contrasts two choices: use the Article II standard to limit the impeachment power or allow Congress to remove a judge if it disagrees with his decisions. *Id.* He does not consider other alternative meanings of the “good behavior” standard.

203. See Martin M. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. CAL. L. REV. 673, 673-78, 682-93, 701-06 (1999).

204. *Id.* at 677; see also CURRIE, *supra* note 59, at 28-38.

205. Prakash & Smith, *supra* note 22, at 87-92, 107-09.

206. *Id.* at 110, 114-21, 127-28.

207. See Act of Sept. 14, 1922, 42 Stat. 837.

208. For a brief account of its development, see Paul D. Carrington, *Checks and Balances: Congress and the Federal Courts*, in REFORMING THE COURT, *supra* note 37, at 137, 147-52.

209. MARY L. VOLCANSEK, *JUDICIAL MISCONDUCT: A CROSS-NATIONAL COMPARISON* 102 (1996).

210. *Id.*

211. See Albert Yoon, *As You Like It: Senior Federal Judges and the Political Economy of Judicial Tenure*, 2 J. EMPIRICAL LEGAL STUD. 514 (2005); see also Act of Aug. 5, 1939, ch. 433, 53 Stat. 1204, 1204-05.

than ten years, such as Judge Pickering, were retired at half pay.<sup>212</sup> In 1954, judges and Justices were encouraged to withdraw from full duty after an extensive period of service.<sup>213</sup> The required period of service varies in length according to their age at the time of appointment, but they may, at the end of that time, either retire at full pay, or take *senior status*.<sup>214</sup> Those on senior status remain on call by their chief judge and generally bear lighter caseloads.<sup>215</sup> Most federal judges take senior status when they become eligible because they are then empowered to limit their caseloads.<sup>216</sup> As a consequence of these reforms, decrepit judges in the district courts or courts of appeal are seldom a concern. But these reforms did not address the problem posed by Judge Ritter, who never would have voluntarily surrendered power.

In 1948, at the suggestion of the Judicial Conference, Congress delegated some of the responsibility for the oversight of courts to a Judicial Council in each circuit.<sup>217</sup> The 1948 statute provided that “[e]ach judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district courts shall promptly carry into effect all orders of the judicial council.”<sup>218</sup> Thus, the district courts were to be subject to restraints in the exercise of their “kingly power,”<sup>219</sup> but it was not clear what those restraints might be.

In 1965, Alfred Murrah, the Chief Judge of the Tenth Circuit and *ex officio* chair of its Judicial Council, admirably invoked the 1948 law to relieve District Judge Stephen Chandler of his docket, much as Judge Pickering had his docket removed by Congress in the 1801 Act.<sup>220</sup> The case for doing so was strong, although the contrary tradition imposed on Judge Murrah a substantial burden of moral

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212. 53 Stat. at 1205.

213. ARTEMUS WARD, DECIDING TO LEAVE: THE POLITICS OF RETIREMENT FROM THE UNITED STATES SUPREME COURT 153-58 (2003).

214. 28 U.S.C. § 371 (2000); Yoon, *supra* note 211, at 514.

215. Yoon, *supra* note 211, at 536.

216. *Id.* at 497, 515-16 (“Most pension-eligible judges choose to remain on the bench as senior judges.... Since 1984, over 80 percent of all federal judges have taken senior status.”).

217. See Act of June 25, 1948, 62 Stat. 902-03 (codified as amended 28 U.S.C. § 332); ALFINI ET AL., *supra* note 9, § 1.04.

218. *Id.* § 332.

219. *Supra* note 104 and accompanying text.

220. See Robert R. Davis, Note, *The Chandler Incident and Problems of Judicial Removal*, 19 STAN. L. REV. 448, 448, 450 (1967).

courage.<sup>221</sup> In 1962, Chandler had testified before a United States Senate subcommittee that he was afraid of being poisoned by lawyers, that his telephone was tapped, and that his fellow judges sometimes privately cursed him.<sup>222</sup> Twice he had been removed by writ of mandamus issued by the court of appeals from hearing lawsuits because of credible “allegations of personal interest or bias and prejudice.”<sup>223</sup> He had barred the United States Attorney in Oklahoma City and five other Oklahoma City lawyers from practicing in federal court; each of those rulings had been strongly overruled by the Court of Appeals in highly critical opinions.<sup>224</sup> In addition, in 1965, an Oklahoma grand jury indicted Chandler on the charge of conspiring to have his private road paved by the county.<sup>225</sup> Murrah’s Tenth Circuit Judicial Council found that he was “unable or unwilling to discharge efficiently the duties of his office.”<sup>226</sup>

Judge Chandler petitioned the Supreme Court for an order restoring his docket.<sup>227</sup> The Court, holding that the Council’s order was interlocutory and not ripe for review, did not reach the merits of Chandler’s constitutional claim that his removal would violate Article III.<sup>228</sup> Justices Black and Douglas dissented, urging that “[w]e should stop in its infancy, before it has any growth at all, this idea that the United States district judges can be made accountable for their efficiency or lack of it to the judges just over them in the federal judicial system.”<sup>229</sup>

Shortly after the Supreme Court’s disposition, the indictment of Judge Chandler was dismissed and the matter of his incapacity was settled by assigning him a limited caseload.<sup>230</sup> Had he been convicted, he would have been subject to impeachment and removal

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221. *See id.* at 450.

222. *US Judge Stephen Chandler, 89, Often Feuded with His Colleagues*, N.Y. TIMES, Apr. 29, 1989, at A10.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Chandler v. Judicial Council of the Tenth Circuit of the U.S.*, 382 U.S. 1003 (1966) (mem.).

228. *Id.* at 1003-04.

229. *Id.* at 1006 (Black, J., dissenting).

230. *Davis*, *supra* note 220, at 450.

even under the Article II standard applicable to executive branch officers.<sup>231</sup>

Parties and lawyers whose cases were assigned to a judge such as Judge Ritter or Judge Chandler were right to feel ill-served by the United States, but the United States itself was ill-served when a United States Attorney or other federal officials were equally subject to judicial abuse. The restraint imposed on Judge Chandler encouraged the Department of Justice to ask the Judicial Council of the Tenth Circuit to exclude Judge Ritter in Utah from deciding civil or criminal cases in which the United States was a party.<sup>232</sup> Judge Ritter died before that issue was resolved.<sup>233</sup>

In 1980, Congress at last explicitly empowered the regional Judicial Councils to follow the example set by Chief Judge Murrah, rejecting the advice offered in the dissents of Justices Black and Douglas.<sup>234</sup> Judge John H. McBryde of the Northern District of Texas soon challenged the 1980 Act.<sup>235</sup> McBryde had been the subject of an extended investigation by a committee of the Fifth Circuit's Council.<sup>236</sup> In a 159-page report, it recorded his frequent brutality in his treatment of parties, witnesses, lawyers, and fellow judges,<sup>237</sup> and it recommended that he be publicly reprimanded and

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231. At least three circuits have held that prosecution of judges can precede impeachment. See *United States v. Claiborne*, 727 F.2d 842, 845 (9th Cir. 1984); *United States v. Hastings*, 681 F.2d 706, 710 (11th Cir. 1982); *United States v. Isaacs*, 493 F.2d 1124, 1140-44 (7th Cir. 1974); see also *Chandler*, 398 U.S. at 140 (Douglas & Black, JJ., dissenting) ("If they break a law, they can be prosecuted. If they become corrupt or sit in cases in which they have a personal or family stake, they can be impeached by Congress.").

232. COWLEY & NIELSEN, *supra* note 181, at 286-88.

233. *Id.* at 301.

234. See The Judicial Conduct and Disability Act of Oct. 15, 1980, Pub. L. No. 76-458, 94 Stat. 2035 (1980) (codified as amended in scattered sections of Title 28 and at 28 U.S.C. § 372 (2000)). For an account of legislation, see Stephen B. Burbank, *Procedural Rulemaking under the Judicial Council's Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283 (1982). For a review of practices under the Act, see JUDICIAL CONDUCT & DISABILITY ACT STUDY COMM., IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980: A REPORT TO THE CHIEF JUSTICE (2006), available at <http://www.supremecourtus.gov/publicinfo/breyercommitteereport.pdf>.

235. See Linda Greenhouse, *Judiciary's Right To Punish Judge Is Affirmed*, N.Y. TIMES, Oct. 8, 2002, at A24.

236. *McBryde v. Comm'n To Review Circuit Council Conduct & Disability Orders of the Judicial Conference*, 264 F.3d 52, 54 (D.C. Cir. 2001), *cert. denied*, 537 U.S. 821 (2002).

237. *Id.* The example chosen by the Court of Appeals arose in 1992:

Judge McBryde sanctioned a lawyer appearing before him for failing to have her client attend a settlement conference in violation of Judge McBryde's



asked to retire. The Council reprimanded him and relieved him of his docket for one year.<sup>238</sup> Its order was approved by the Committee of the Judicial Conference, the institution that McBryde then sued in the District of Columbia.<sup>239</sup> The D.C. Court of Appeals upheld the law and the power conferred on the Judicial Council,<sup>240</sup> observing that the constitutional assurances of job security for judges were only intended to protect against political intervention by the other branches of the federal government and were not intended to immunize judges from judgments by other members of the judicial branch.<sup>241</sup> The Supreme Court denied certiorari.<sup>242</sup>

In 2002, the 1980 statute was modified as a whole chapter of Title 28 of the United States Code.<sup>243</sup> The process now in place explicitly

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standard pretrial order, which required all principals to attend the conferences. Counsel represented a corporation and its employee, defendants in a suit in which plaintiffs, a woman and her 10-year old daughter, had alleged sexual harassment. One of the allegations was that the individual defendant “had terrorized the 10-year old ... by popping out his glass eye and putting it in his mouth in front of her.” The lawyer thought the presence of the individual defendant would be counter-productive to settlement efforts; the individual had no assets and had given her full authority to settle. After chastising the lawyer, Judge McBryde required that she attend a reading comprehension course and submit an affidavit swearing to her compliance. The attorney submitted an affidavit attesting to the fact that she found a course and attended for three hours a week for five weeks. Judge McBryde challenged her veracity and required that she submit a supplemental affidavit “listing each day that she was in personal attendance at a reading comprehension course in compliance with [the] court’s order; the place where she was in attendance on each date; the course title of each course; how long she was in attendance on each day; and the name of a person who can verify her attendance for each day listed.” She complied.

*Id.* at 67-68 (citation omitted).

238. *Id.* at 54.

239. *Id.* at 55.

240. *Id.* at 68.

241. The Court of Appeals stated:

Thus it seems natural to read Hamilton as seeing the guarantees of life tenure and undiminished compensation, and the limited means for denying a judge their protection, simply as assuring independence for the judiciary from the other branches. The Supreme Court has considered the same passage as Judge McBryde invokes and so interpreted it: “In our constitutional system, impeachment was designed to be the *only* check on the Judicial *branch by the Legislature.*”

*Id.* at 66 (quoting *Nixon v. United States*, 506 U.S. 224, 235 (1993)).

242. *McBryde v. Comm. To Review Circuit Council Conduct & Disability Orders of the Judicial Conference*, 537 U.S. 821 (2002).

243. *See* Judicial Improvements Act of 2002, 28 U.S.C. §§ 351-364 (Supp. 2005).

authorizes the Circuit Judicial Councils to entertain citizens' grievances against federal judges regarding judges' conduct, but only apart from the substance of any rulings they might make.<sup>244</sup> Councils may investigate and conduct hearings in confidence, and may reimburse a judge for his expenses if he is found to be unjustly accused of misconduct.<sup>245</sup> A Council may order "that, on a temporary basis for a time certain, no further cases be assigned to the judge whose conduct is the subject of a complaint."<sup>246</sup> Or it may censure a judge either privately or by a public pronouncement.<sup>247</sup> Or it may certify his disability or request his voluntary retirement.<sup>248</sup> In 2003, the Judicial Conference recommended that all the circuits post their disciplinary orders online.<sup>249</sup> In 2008, only two had done so.<sup>250</sup>

The rulings of a Judicial Council may be appealed by the judge or by a complaining party to a standing committee of the national Judicial Conference established to review the decisions of judicial councils.<sup>251</sup> A matter may also be referred to the Judicial Conference for consideration of a reference to the House of Representatives for possible impeachment and removal.<sup>252</sup> But all such actions are explicitly nonreviewable by conventional civil proceedings.<sup>253</sup>

The 2002 statute also provides for direct reference to Congress when a judge is convicted of a felony under state or federal law; the Judicial Conference may directly refer the matter to Congress for consideration of possible impeachment and removal.<sup>254</sup> Congress, however, has failed to specify standards of judicial behavior, notwithstanding repeated efforts of the American Bar Association (ABA) to express appropriate principles of "good behavior" that have, over time, found their way into the law of every state.<sup>255</sup> In

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244. *Id.* § 351.

245. *Id.* §§ 360(a), 361.

246. *Id.* § 354(a)(2)(i).

247. *Id.* § 354(a)(2)(ii)-(iii) (2000).

248. *Id.* § 354(a)(2)(B)(i)-(ii).

249. See MacLean, *supra* note 8, at 18.

250. *Id.*

251. 28 U.S.C. § 357(a).

252. *Id.* § 355(b).

253. *Id.* § 357(c).

254. *Id.* § 355(b)(2).

255. The Canons of Judicial Ethics of 1924 were drafted by an ABA committee chaired by Chief Justice Taft; these were largely hortatory. Steven Lubet, *Judicial Campaign Speech and the Third Law of Motion*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 425, 429 (2008). In 1972,

1998, the Judicial Conference of the United States did at last adopt a version that is hortatory, but authorizes regional councils to adopt local rules.<sup>256</sup> The Judicial Conference is empowered by the 2002 Act to “make its own determination” that impeachment and removal are appropriate and to refer its decision to Congress.<sup>257</sup>

Enforcement of standards of judicial conduct in the federal courts has drawn substantial criticism. In 2007, the Fifth Circuit Council censured Judge Samuel Kent of Galveston on a finding that he had sexually harassed a staff member.<sup>258</sup> This was at the time deemed an inadequate response by some.<sup>259</sup> And in August 2008, Judge Kent was indicted on six counts of sexual abuse in violation of federal law.<sup>260</sup> Assuming that the evidence of his guilt was sufficient to justify his indictment, one might question whether the Council was too forgiving.<sup>261</sup> It seems that he could be impeached and removed on evidence of the alleged misconduct that fell short of establishing a certainty justifying a long term in prison.

A 2006 report by a committee chaired by Justice Stephen Breyer found that a significant number of the grievances filed were mishandled.<sup>262</sup> In that year, Congressman Sensenbrenner proposed the establishment of an Inspector General whose duty would be to report judicial misdeeds to Congress.<sup>263</sup> In 2008, another Judicial Conference committee, chaired by Circuit Judge Ralph Winter, recommended that some national standards be provided by the Conference.<sup>264</sup> Mark Harrison, a leader of an ABA commission

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the Canons were replaced by the Code of Judicial Conduct, *id.*; it was in turn replaced in 1990 by the ABA Model Code of Judicial Conduct. *Id.* Variations of these proposals have been enacted in every state. Yet another Model Code was published by the ABA in 2007. *See id.* at 431-32. For an account of this body of law, see generally ALFINI, *supra* note 9, § 1.03, *passim*.

256. ALFINI, *supra* note 9, § 1.03, *passim*.

257. 28 U.S.C. § 355(b)(1).

258. Pamela A. MacLean, *An Ill-Timed Judicial Reprimand*, NAT'L L.J., Oct. 8, 2007 at 5.

259. *See* Dolph Tillotson, *Judge Kent Should Resign*, GALVESTON DAILY NEWS, Oct. 10, 2007.

260. Dan Slater, *Samuel Kent: First Federal Judge Charged with Federal Sex Crimes*, WALL ST. J., Aug. 29, 2008.

261. Pamela A. MacLean, *Questions About Judicial Review After Indictment*, NAT'L L.J., Sept. 8, 2008, at 6.

262. IMPLEMENTATION OF THE JUDICIARY CONDUCT AND DISABILITY ACT OF 1980 (2007), *supra* note 214, at 10.

263. *See* Editorial, *An Inspector General? Rep. James Sensenbrenner's Proposal To Create a Watchdog for the Judiciary is a Bad Idea Come Too Soon*, WASH. POST, Oct. 9, 2006, at A16.

264. *See* Tony Mauro, *Binding National Rules Adopted for Handling Judicial Misconduct*

evaluating the effectiveness of enforcement in state courts of law governing the behavior of judges, has vigorously protested the lack of transparency in a process that relies chiefly on private censure.<sup>265</sup>

Without endorsing its every word, or approving the weak response of the Conference, we praise this legislation, but wonder why it took over two centuries to establish a suitable process for confronting serious judicial misconduct. A shortage of citizen-lawyers advocating the public interest is the most apparent explanation—until recent times, lawyers were not courageous enough to charge a sitting federal judge with misconduct. But at last, a process now provides occasions for the exercise of disinterested assessment of judicial conduct, and citizen-lawyers should employ that process and provide the disinterested assessment the system needs. To be sure, many of the grievances filed against judges, whether state or federal, are and will continue to be undeserving of extended notice.

Had such a process been established in 1802 when the Judiciary Act of 1801 was repealed, it would have served, over the intervening years, to spare many litigants, lawyers, and lesser officers of the court of many abuses and injustices at the hands of federal judges in conditions of physical or psychiatric decline. The process would have enabled the retirement or removal of the most impaired judges, but also would have deterred misconduct that was the product of judicial arrogance, a quality that is probably more likely to evolve in the minds of judges assured of absolute job security and vast powers over others.

Indeed, it is not too much to ask of the new system of discipline that it constrain the misconduct of federal judges in their employment practices. As Richard Posner and his coauthors have recently demonstrated, the conduct of judges in hiring law clerks is often deplorable, and even outrageous.<sup>266</sup> The Judicial Conference has tried to fashion rules to govern that market, but has not been able to enforce them effectively.<sup>267</sup> That can, and should, be changed. No

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*Complaints*, LEGAL TIMES, Mar. 12, 2008, available at <http://www.law.com/jsp/article.jsp?id=1205232267963>.

265. See MacLean, *supra* note 8, at 18.

266. Christopher Avery, Christine Jolls, Richard A. Posner & Alvin E. Roth, *The New Market for Federal Judicial Law Clerks*, 74 U. CHI. L. REV. 447, 448-52 (2007).

267. See *id.* at 459-60.

judges are engaged in criminal misconduct, but some judges impose a serious harm on candidates for clerkships and on other judges interested in recruiting the same candidates. A federal judge who persists in such misconduct could and should be publicly denounced, and if that does not work, he or she should be deemed ripe for impeachment and removal pursuant to Article III.

*C. The Impeachment of Justice Chase: Are Justices Different?*

In addition to removing Judge Pickering, the Jeffersonian Congress also considered the removal of Justice Chase.<sup>268</sup> They did not proceed against him at once, although he had plainly abused his power in Alien and Sedition Act cases.<sup>269</sup>

In 1803, Justice Chase, in a charge to a grand jury, proclaimed that the Judiciary Act of 1802, which repealed the Act of 1801, was unconstitutional, and went on to denounce President Jefferson as the author of mobocracy that would destroy “peace and order, freedom and property.”<sup>270</sup> This was more than the Jeffersonians could stand.<sup>271</sup> With the concurrence of the President, Congressman John Randolph initiated articles of impeachment enumerating Chase’s unjust procedural rulings.<sup>272</sup> The House approved his impeachment.<sup>273</sup>

In 1805, Chase’s impeachment was tried in the Senate with “lame duck” Vice President Burr presiding.<sup>274</sup> Burr, who had a poisonous relationship with President Jefferson,<sup>275</sup> had also in 1804 killed Alexander Hamilton in a duel, and had been indicted for murder.<sup>276</sup> This event had further magnified both his celebrity and his disrepute on all sides.<sup>277</sup> Over one-thousand spectators attended the

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268. ELLIS, *supra* note 93, at 76.

269. *Id.* at 78-79.

270. *Id.* at 79-80.

271. ELLIS, *supra* note 93, at 80.

272. *Id.* at 81.

273. *Id.*

274. BEVERIDGE, *supra* note 157, at 175, 180-82.

275. Whatever confidence Jefferson may have had in Burr in 1800 when he selected him as a vice presidential candidate was lost when Burr failed to repudiate efforts of some Federalists in the House of Representatives to elect him as President rather than Jefferson. See JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* 41-43 (2002).

276. *See id.* at 20-47.

277. Some regarded him as disqualified to sit on the matter because of his poisonous

trial in the new Capitol.<sup>278</sup> The defense argued that mere error in the making of procedural rulings, however grave, is not an impeachable offense.<sup>279</sup> Among the witnesses for Chase was Chief Justice John Marshall, but his testimony on Chase's character was diffident.<sup>280</sup> His conduct suggests the possibility that he privately shared the view that Chase should have been removed.<sup>281</sup>

As Chief Justice William Rehnquist acknowledged,<sup>282</sup> Chase's behavior justified his removal. His verbal assault on President Jefferson alone should have disabled him from thereafter sitting on matters in which the actions of the President might be brought into question. Arguably, it was inappropriate to consider that his judicial decisions on grave public matters could not be reasonably supposed by informed citizens to be the product of a disinterested assessment of the facts and law at hand. But his outrageous conduct at the Callendar trial violated even the rustic standards of the day.<sup>283</sup>

Randolph provided poor representation of the case for Chase's removal. Among other failings, he lost his notes and made a pitifully bad closing argument.<sup>284</sup> Because a few Jeffersonian Senators were angered by Randolph or thought that the removal of a Federalist Justice threatened the integrity of the judiciary,<sup>285</sup> the Senate could not quite muster the two-thirds vote to remove Chase.<sup>286</sup> It is reported that all those present were sorry that the proceeding had even been commenced.<sup>287</sup> So Justice Chase remained on the Court

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relations with both the President and many Federalists. CHERNOW, *supra* note 96, at 719.

278. ELLIS, *supra* note 93, at 96.

279. BEVERIDGE, *supra* note 157, at 189.

280. *Id.* at 192-96.

281. ELLIS, *supra* note 93, at 99.

282. *But cf.* WILLIAM H. REHNQUIST, GRAND INQUESTS: THE IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 73 (1992).

283. RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 224-51 (1973).

284. Randolph displayed "much distortion of face and contortion of body, tears, groans, and sobs, and occasional pauses for recollection, and continual complaints of having lost his notes." 1 MEMOIRS OF JOHN QUINCY ADAMS: COMPRISING PORTIONS OF HIS DIARY FROM 1795 TO 1848, at 359 (Charles F. Adams ed., 1874); *see also* HENRY ADAMS, JOHN RANDOLPH 146-47 (1899).

285. Perhaps some may have agreed with David Currie that it is better to let a hundred guilty people go free than to convict one innocent judge. *See* CURRIE, *supra* note 59, at 37; *see also* Kurland, *supra* note 160, at 665-66.

286. For an extended account of the event, *see* BEVERIDGE, *supra* note 157, at 168-220.

287. ELLIS, *supra* note 93, at 103.

with Chief Justice Marshall, but constrained himself from further misdeeds.<sup>288</sup>

President Jefferson lent no aid to Chase's removal. He was furious at Randolph's ineffectiveness in presenting the case, as well as over other matters,<sup>289</sup> and perhaps sought to reduce partisan frictions. He later declared that the impeachment process was a "farce" requiring a constitutional amendment to correct an error in our Constitution, which made "any branch independent of the nation."<sup>290</sup> The failure to remove Justice Chase was a serious failure of the duty of Congress to act as a "check and balance" to correct gross abuse of power by a Justice. Prakash and Smith are surely correct that the mere failure to exercise the power to impeach and remove Chase does not tell us the meaning of the constitutional text.<sup>291</sup>

The failure to remove Chase might be seen as a consequence of the extreme hostility dividing the parties in the Senate, hostility that may have evoked a hope of resolution by a few Democratic-Republican Senators.<sup>292</sup> Leaving Chase on the Court might indeed have served President Madison's later term in office by reducing the animus and mistrust of the Federalists toward him.<sup>293</sup>

The best result in the Chase case would have been achieved if Federalist politicians had joined Randolph in presenting the case against him. Perhaps Chief Justice Marshall's diffident testimony was an attempt to make the dispute less partisan. If he had been more direct in doing so, he would deserve a special salute. We could then point to his conduct in the Chase case as a role model for disinterested citizen-lawyers who, without regard for their partisan connections, could and should have agreed that Chase was unfit for the office he held. For that reason, and not because he was a Federalist, he should have been impeached and removed.

Where, indeed, were the citizen-lawyers among the Federalists in the Senate? Why did they wait until after the inauguration of

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288. *Id.* at 105.

289. See BEVERIDGE, *supra* note 157, at 221-22.

290. *Jefferson to Giles, Apr. 20, 1807*, in 9 THE WRITINGS OF THOMAS JEFFERSON 42, 46 (Paul Ford ed., 1898).

291. Prakash & Smith, *supra* note 22, at 26.

292. ELLIS, *supra* note 93, at 103.

293. On the relatively benign politics of Madison's second term, see GARRY WILLS, JAMES MADISON 153 (2002).

President Jefferson to impeach and remove Chase? Had they removed him when he should have been removed, at the time when, as lame ducks, they were enacting the Judiciary Act of 1801, that legislation would have acquired an entirely different hue. The explanation lies, in large measure, on the intense and inappropriate partisan loyalty of Federalists to one of their own. That sentiment should have been cast aside by those practicing the classical civic virtue of citizen-lawyers.

### *1. How To Remove A Justice*

It is hard to identify a Justice who has sat on the Supreme Court in the ensuing two centuries who equaled Samuel Chase in his departure from the standard of “good behavior” by openly abusing his or her power. But there have been numerous others who have violated the standard expressed by Lord Coke<sup>294</sup> because they ceased to perform their job. Indeed, this has been a recurring problem.

The problems of power-crazed abuse of lawyers and litigants, such as that exhibited by Judge Ritter,<sup>295</sup> are less likely to occur in a multi-judge court. Often, the members of the Supreme Court have found ways to diminish harm resulting from a single Justice’s mental disabilities. The requirement of circuit riding imposed by the original Judiciary Act of 1789 long deterred some Justices from clinging to their office when they could not perform its duties.<sup>296</sup> Also, for a time, it was traditional for Justices to designate one of their colleagues to advise a senior member of the Court when his time for retirement had come.<sup>297</sup>

In the twentieth century, the burden of being a Supreme Court Justice was greatly diminished. Circuit riding was abolished in 1891.<sup>298</sup> In 1925, the Justices were empowered to exercise substantial control over their workload,<sup>299</sup> a power extended to be almost absolute in 1988.<sup>300</sup> Their quarters were moved from the basement

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294. See *supra* note 30 and accompanying text.

295. See text accompanying notes 164-72.

296. See Judiciary Act of 1789, ch. 20, 1 Stat. 73, § 4.

297. CARL BRENT SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW 444 (1963).

298. See Act of Mar. 3, 1891, 26 Stat. 826, § 1.

299. See Act of Feb. 13, 1925, 43 Stat. 936, § 237(b).

300. See Act of June 27, 1988, 102 Stat. 662; see also Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81 (1988).



of the Capitol building to the most pretentious building in the capital city,<sup>301</sup> and Justices were provided with abundant staff support to whom much of their work can be delegated.<sup>302</sup>

Also in the second half of the twentieth century, the Court's political role increased to the point that many Justices became increasingly reluctant to surrender their vast power, regardless of their physical or mental condition. Some who were able to continue the work resigned from office to avoid a risk that their successor might be named by a politically uncongenial President.<sup>303</sup> Very few have accepted the benefits offered to senior judges, apparently because being a Justice is too gratifying and entails too little work to induce voluntary retirement. In 2000, David Garrow reviewed numerous cases of serious debilitation of Justices and urged a constitutional amendment to address the problem of mental decrepitude.<sup>304</sup> Nonconstitutional remedies have also been offered in recent years: variable term limits,<sup>305</sup> age limits,<sup>306</sup> and even a "golden parachute."<sup>307</sup>

Justices who do not do their job or who use their office for personal advantage commit the two unforgivable sins identified by

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301. Justice Brandeis protested that the Supreme Court building made his colleagues into "nine black beetles in the temple of Karnak" and would cause them to have an inflated vision of themselves. Pnina Lahav, *History in Journalism and Journalism in History: Anthony Lewis and the Watergate Crisis*, 29 J. S. CT. HIST. 163, 163 (2004).

302. See generally TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* (2006); ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* (2006); see also Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 791 (2001).

303. As discussed in a biography of Justice White, reporter Joan Biskupic of the *Washington Post* reported that Justice Byron White considered retirement upon the inauguration of President Clinton: "White has said that since he came in with a Democratic administration, it would be fitting to retire under a Democratic administration." DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE* 436 (1998).

304. David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995 (2000); see also DAVID N. ATKINSON, *LEAVING THE BENCH: SUPREME COURT JUSTICES AT THE END 172-75* (1999).

305. See generally REFORMING THE COURT, *supra* note 37.

306. Richard A. Epstein, *Mandatory Retirement for Supreme Court Justices*, *in id.* at 415.

307. David R. Stras, *The Incentives Approach to Judicial Retirement*, 90 MINN. L. REV. 1417, 1439 (2006) (describing a lucrative retirement plan designed to encourage judicial retirements).

Edward Coke.<sup>308</sup> Their removal is an important and sometimes urgent public business. Surely the Constitution should not be read to prevent that result, so long as the process employed to reach it engages the legislative process<sup>309</sup> and is designed to exclude or minimize the possibility that the removal is pursued for partisan political reasons. Disinterested citizen-lawyers have a duty to promote a process that would function without regard to the political connections of a Justice whose behavior or failure to perform the office is reasonably questioned.

Consider the possibility that the Republican Congress could have removed Chief Justice Rehnquist when he was plainly disabled, as he was in 2005 and 2006. Or perhaps whether citizen-lawyers should have raised the question of his retirement earlier, when, for a time, he was suffering from substance addiction resulting from a prescribed medication?<sup>310</sup> Was it not a duty of the citizen-lawyer to support a request for his retirement as an act needed to support the independence of the judiciary and the integrity of the law? Indeed, where was the organized bar at that time? Is it not unprofessional to prolong and protect the careers of Justices who are no longer doing their jobs? The profession has been, in recent decades, quite responsible in establishing standards of judicial conduct and systems for their enforcement in state courts and very recently in the Judicial Conference.<sup>311</sup> But why are there no standards that apply to Justices?

To acknowledge that Congress is responsible for the removal of Justices who are unable or unwilling to practice “good behavior” is not to join Gerald Ford in asserting that the standard for removal of a Justice is whatever the House of Representatives deems it to be.<sup>312</sup> Congress is a political body that cannot make disinterested,

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308. See *supra* note 30 and accompanying text.

309. On the indispensability of congressional engagement in any removal process, see Pfander, *supra* note 32, at 1241-50.

310. Questions remain about the extent of the resulting disability. See Jack Shafer, *Rehnquist's Drug Habit: The Man in Full*, SLATE, Sept. 9, 2005, <http://www.slate.com/id/2125906/>.

311. See, e.g., Press Release, The Judicial Conference of the United States, National Rules Adopted for Judicial Conduct and Disability Proceedings (Mar. 11, 2008), available at [http://www.uscourts.gov/Press\\_Releases/2008/judicial\\_conf.cfm](http://www.uscourts.gov/Press_Releases/2008/judicial_conf.cfm).

312. “What, then, is an impeachable offense? The only honest answer is that an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history.” J.Y. Smith & Lou Cannon, *Gerald R. Ford, 93, Dies; Led in*

nonpartisan assessments of the capacities of Justices. But it would be appropriate for Congress to establish reasonable standards of judicial conduct applicable to Justices but unrelated to the substance of their decisions. It is a task for citizen-lawyers and the organized bar to guide Congress in establishing a process placing the primary responsibility for the enforcement of those standards with an appropriate and disinterested institution whose advice would command its respect.

Congress exercised this responsibility in 2002 by creating the Judicial Council process described earlier.<sup>313</sup> A similar process is needed to discipline nonperforming Justices. Who, the reader is likely to ask, might be qualified to judge a Justice? The Judicial Conference of the United States is the obvious choice, were it not for the fact that the chairman of the Conference is *ex officio* the Chief Justice of the Supreme Court.<sup>314</sup> That arrangement, made in 1922 at the suggestion of Chief Justice Taft, has never been seriously reconsidered by the Conference or by Congress. A secondary effect of the steady enlargement of the power of the Conference has been the empowerment of the Chief Justice personally; as with Justices, no system of accountability applies to his conduct. Judith Resnik has made the case for separation of the two offices.<sup>315</sup> There is in fact little reason for them to be united.<sup>316</sup> But if her arguments cannot find traction in a passive Congress, another alternative is needed.

Creating a special forum to judge Justices that would be comparable to the judicial councils of each circuit and of the review committee of the Judicial Conference is a complex but not impossible task. The judges who judge Justices cannot be selected by the same President who would select the Justice who would fill the position of a Justice found to be unfit; the presidential judgment would be tainted by self-interest. Nor can they be judged by officers of the Department of Justice, an institution litigating before the Court on a daily basis.<sup>317</sup> Neither can the special forum consist of other

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*Watergate's Wake*, WASH. POST, Dec. 27, 2006, at A1 (quoting Statement by Gerald Ford regarding Impeachment of William O. Douglas, Apr. 15, 1970).

313. See *supra* text accompanying notes 222-27, 234.

314. See 28 U.S.C. § 331 (2000).

315. Judith Resnik, *Democratic Responses to the Breadth of Power of the Chief Justice*, in REFORMING THE COURT, *supra* note 37, at 181.

316. *Id.*

317. Thus, serious questions were raised about the integrity of the prosecution of Judge

Justices or be selected by them because of the mistrust this would generate among sitting Justices. Those who judge Justices would have to be mature judges; indeed, so mature that they have no hope of appointment to the Court, but not so mature that they are themselves decrepit.

A council of judges can be identified who share all these requisite qualities. They are the chief judges of the thirteen courts of appeals. Chief judges are senior among their colleagues, but not too senior, for they are required to surrender their administrative duties at the age of seventy.<sup>318</sup> If thirteen is thought to be too large a panel, diverse methods of random selection might be established to reduce that number. For example, some form of rotation that alternated membership annually so that the responsibility is never imposed for long on any members of that group.

Such a Council of Chief Judges could be empowered by Congress to exercise over Justices the powers that circuit councils exercise over circuit and district judges. The Council of Chief Judges could receive complaints from citizen-lawyers and be empowered to order “that, on a temporary basis for a time certain,” the Justice deemed unfit to hold office shall sit on no cases.<sup>319</sup> Like other councils addressing the judges that they judge, such a council might be empowered to censure a Justice either privately or by a public pronouncement for conduct seriously violating the standards of good judicial behavior enacted by Congress. Or it might certify a Justice’s disability or request his voluntary retirement. Or in extreme circumstances, it might refer a case to the House of Representatives for possible impeachment and removal.

How might such a Council of Chief Judges inform itself about the mental health and physical condition of the Justices? There is presently, as noted, consideration of the establishment of an Inspector General within the Judiciary, not unlike other inspectors general in the federal government.<sup>320</sup> Such an officer, if established,

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Harry Claiborne for tax evasion; it was suggested that the prosecution was a response to diverse rulings against the Department. See Todd D. Peterson, *The Role of the Executive Branch in the Discipline and Removal of Federal Judges*, 1993 U. ILL. L. REV. 809, 872-79 (1993).

318. See 28 U.S.C. § 45(c) (2000).

319. See, e.g., 28 U.S.C. § 354 (2000).

320. See, e.g., The Judicial Transparency and Ethics Enhancement Act of 2006, H.R. 5219, 109th Cong. (2006). Unfortunately, that proposal was advanced as a partisan proposal to

might, among other duties, provide the Council with a modest investigative arm. Alternatively, the chief judges might rotate that responsibility among their thirteen-member group. If issues of fact arose, a confidential hearing might be held.

What difference would such an institution make? It could have resulted in the earlier termination of numerous Justices' careers. Most earlier terminations would occur voluntarily to avoid a discernible risk that one might reasonably be identified as unfit for the office one is holding. Such an institution might also deter some other forms of judicial conduct that falls short of good behavior, such as a Justice's failure to recuse himself from deciding a case in which he or she has a financial or other significant interest.

For example, Chief Justice Marshall's conduct in the celebrated 1819 case of *McCulloch v. Maryland*<sup>321</sup> might have been different and less subject to criticism from lawyers striving to impose appropriate moral standards on the judiciary. In that case, Maryland sued a cashier of the Baltimore branch of the Bank of the United States to collect a tax imposed by its legislature on all banks doing business in the state.<sup>322</sup> The United States resisted the tax and challenged the power of Maryland to tax federal instrumentalities; Maryland in reply challenged the power of the United States to establish a bank.<sup>323</sup> Marshall, for a unanimous Court, published a thirty-seven-page opinion, not only confirming the position of the United States, but also laying an important stone in the development of the legal relationship between the nation and the states.<sup>324</sup>

*McCulloch* attracted strong criticism on the merits. Critics accused Marshall and the Court of gross professional misconduct in misusing the indeterminacy of the constitutional text to achieve his political aim of denying sovereignty to the states and usurping the

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punish judges for incorrect decisions. David D. Kirkpatrick, *Republican Suggests Judicial Inspector General*, N.Y. TIMES, May 10, 2005, at A12.

321. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Chief Justice Marshall's professional ethics were also subject to question in *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137 (1803). In that case, he himself was the officer responsible for delivering the commission to Marbury, and it was his own failure that gave rise to the issue that he presumed to decide. *Id.*

322. See *McCulloch*, 17 U.S. (4 Wheat.) 316.

323. *Id.* at 319.

324. *Id.* at 437.

power and responsibility of legislative bodies.<sup>325</sup> The critics were surely correct that the opinion went well beyond the needs of the case. Congress had not forbidden states to tax the Bank except by loose implication; a more defensible decision would have been to uphold the state's power to tax until Congress otherwise explicitly immunized the Bank.<sup>326</sup> Congress was at pains to avoid providing any such immunity when the time came to extend the Bank's charter. As his critics recognized, Marshall's holding went far in embedding nationalism in the literature of the legal profession.<sup>327</sup> Marshall, in 1832, privately expressed his astonishment that the Union had lasted as long as it had.<sup>328</sup> But he would soon see President Andrew Jackson, who was not a Federalist, invoke his reasoning in *McCulloch* when Jackson relied on Marshall's opinion as establishing the popular source of constitutional legitimacy, and empowering him to ignore South Carolina's attempt to nullify a federal tax.<sup>329</sup>

Another more serious problem with the decision in *McCulloch* was the fact that the Chief Justice was significantly invested in the Bank.<sup>330</sup> He was an original owner of at least ten shares when the Bank opened in 1817.<sup>331</sup> He continued to buy shares in 1818 and, with his wife and brother's estate, owned forty shares in 1819, when he sold five shares and transferred some to other members of his family to be held in trust for his wife.<sup>332</sup> These transactions occurred while the case was pending in the Supreme Court.<sup>333</sup> The decision of the Maryland court had diminished the value of this investment

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325. See, e.g., JOHN TAYLOR, CONSTRUCTION CONSTRUED AND CONSTITUTIONS VINDICATED 79-97 (Lawbook Exchange 1998) (1820).

326. See Howard J. Plous & Gordon E. Baker, *McCulloch v. Maryland: Right Principle, Wrong Case*, 9 STAN. L. REV. 710, 727-30 (1957).

327. See the exchange between Marshall and Spencer Roane in JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 106-54 (Gerald Gunther ed., 1969).

328. He wrote Joseph Story on October 22, 1832, that the "union has been prolonged thus far by miracles." *Letters of Chief Justice Marshall to Timothy Pickering and Joseph Story*, 14 PROC. MASS. HIST. SOC'Y 320, 352 (2d ed. 1900).

329. 3 JAMES D. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 1203-09 (1897).

330. See John T. Noonan, *Bias and Biographers: A Tribute to Gerald Dunne*, 34 ST. LOUIS U. L.J. 725, 728-32 (1990).

331. *Id.* at 728.

332. *Id.* at 729.

333. *Id.* at 730.

by one-third; the decision in *McCulloch* restored its value.<sup>334</sup> The capital gain to himself and his family was roughly one-and-one-half times his annual salary as Chief Justice.<sup>335</sup>

The duty to recuse himself was well-recognized at the time. St. George Tucker had recused himself in a previous case in which his stake was much less than that of Marshall.<sup>336</sup> There was no public knowledge at the time of Marshall's behavior, but the facts surfaced in 1837 in the debate on the renewal of the Bank's charter.<sup>337</sup> By that time, Marshall had repossessed the shares he had transferred.<sup>338</sup> His admirers and political supporters sought to conceal the facts, as did his twentieth-century biographer, Albert Beveridge.<sup>339</sup> John Noonan explained Marshall's behavior:

Marshall was committed to the cause of a national bank. Personally, a family investment was at issue. He did not want to abandon either the cause or the investment; so he did not recuse himself and he did not effectively dispose of the interest. Believing that the political cause rightly affected his views, strongly conscious of inner rectitude, and knowing that there was no power on earth to call him to account, he would not have hesitated to believe that he could judge fairly on the merits.<sup>340</sup>

Judge Noonan is clearly correct that such conduct, even on the part of one of our most admired Justices, was both a disgrace and a product of the Justice's sense of invulnerability. Had a system been in place to hold the Chief Justice accountable for his misconduct, it probably would not have occurred. Justices today often recuse themselves in situations such as that faced by Chief Justice Marshall, but there may be other forms of inappropriate conduct that ought to be deterred by an appropriate form of accountability for Justices similar to that to which federal judges of lower rank, and virtually all state judges, are subject.<sup>341</sup>

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334. *Id.* at 731.

335. *Id.*

336. *Id.* at 732 (citing *Hunter v. Fairfax's Devisee*, 15 Va. (2 Mont.) 90 (1796), *reargued* 1809).

337. See Noonan, *supra* note 330.

338. *Id.*

339. ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* (4 vols. 1916-17).

340. *Id.* at 736.

341. See Linda Greenhouse, *Justices' Conflicts Halt Apartheid Appeal*, N.Y. TIMES, May 13,

The presence of such a process might also have encouraged a number of Justices to retire when the period of their service brought them to an age when ordinary Americans retire, because their energy and creativity had begun a steady decline. And none would have remained on the Court when impairments of health and age had resulted in substantial physical and mental deterioration. Instead, many would leave office in a more timely way if they faced a disinterested assessment of their professional competence.

#### CONCLUSION

Congress should enact legislation providing for the chastisement of Justices or for their removal from office by impeachment on the advice of a panel of independent chief circuit judges in accordance with legislated standards requiring Justices to perform their duties and to abstain from using their powers to benefit themselves. Such legislation is long overdue, violates no valid application of Article III of the Constitution, and would serve to maintain, in the minds of Justices, an awareness of their accountability to their profession. That cause merits the continued support of citizen-lawyers striving to maintain the independence of the federal judiciary.