

*Threats to judicial independence,  
real & imagined*

Public criticism of the federal courts is nothing new.<sup>1</sup> Since the beginning of the republic to the present day, politicians and populace have attacked judicial opinions and decried judicial activism. For example, the response to the landmark Supreme Court decisions of the 1950s, in particular those involving desegregation and church-state relations, was a nationwide movement to remove Chief Justice Warren from the bench.<sup>2</sup> Billboards around the country proclaimed their aim: “Impeach Earl Warren.”<sup>3</sup> Petitions circulated, and over one million Americans signed their names in support of the impeachment effort.<sup>4</sup> Some even proposed that Warren be hanged.

For as long as there has been a federal judiciary, federal judges have been blasted for purportedly overstepping their bounds. Yet by and large the judges have not abdicated their duty to invalidate laws that they believe offend the Constitution. Public criticism of judicial decisions does not, by itself,

necessarily threaten the independence of the judiciary; in fact, under some circumstances, such critiques paradoxically can help bring about a more robust form of judicial independence.

Under our constitutional system, the federal judiciary wields carefully circumscribed powers, but within its proper sphere judicial authority is final and therefore absolute. Among other limitations, federal judges may not issue advi-

1 A modified version of this essay first appeared in *The Georgetown Law Journal* 95 (4) (2007).

2 Kelly A. MacGrady and John W. Van Doren, “AALS Constitutional Law Panel on Brown, Another Council of Nicaea?” *Akron Law Review* 35 (2002): 373, which cites Ed Cray, *Chief Justice: A Biography of Earl Warren* (New York: Simon & Schuster, 1997), 389–392.

3 See Charles J. Ogletree, Jr., “Judicial Activism or Judicial Necessity: The D.C. District Court’s Criminal Justice Legacy,” *The Georgetown Law Journal* 90 (2002): 693, which cites Kermit L. Hall, “The Warren Court: Yesterday, Today, and Tomorrow,” *Indiana Law Review* 28 (1995): 326.

4 Robert L. Brown, “From Earl Warren to Wendell Griffen: A Study of Judicial Intimidation and Judicial Self-Restraint,” *University of Arkansas at Little Rock Law Review* 28 (2005): 2–3.

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sory opinions and have no authority to engage in policy-making. But while the Constitution rules certain functions out of bounds for the courts, it also insulates federal judges from the pressures that can be brought to bear in response to an unpopular, but legally required, decision. Article III guarantees that federal judges shall hold their offices for life with continued “good Behaviour.”

By setting up an independent judiciary, the framers intended to prevent the other branches of government, or the people themselves, from undermining the judiciary’s decisional impartiality. It is “essential to the preservation of the rights of every individual, his life, property, and character, that there be an impartial interpretation of the laws, and administration of justice.”<sup>5</sup> The insulation of judges from popular pressures ensures that all citizens receive equal justice under the law, and prevents judges from being influenced by the whims of the public (or a powerful faction) when they decide cases. In *The Federalist* No. 78, Alexander Hamilton emphasized:

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjectures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

5 Peter D. Webster, “Who Needs an Independent Judiciary?” *Florida Bar Journal* 78 (2004): 24–25, which discusses the creation of and need for an independent judiciary.

The way to achieve this impartiality – to free judges to decide cases based on what the law actually requires, and on nothing else – is to ensure that the judiciary is independent, or, put differently, not subject to reprisals for decisions on the bench.

But judicial independence is not an absolute or singular value defining our courts. The principle of judicial restraint is equally important – and it is inextricably linked to judicial independence. At one level, the tension between the two seems inescapable. But there is an important sense in which an independent judiciary and judicial restraint are flip sides of the same coin. Both aim to minimize the influence of extraneous factors on judicial decision-making. A judge must not decide a case with an eye toward public approbation, because whether a particular result is popular is irrelevant to whether it is legally sound. In the same way, a judge must not consult his own policy preferences (or those of whatever moral philosopher happens to be *au courant* at the time) when construing the Constitution or a statute, because those personal views are immaterial to what the law, fairly construed, actually provides. Judicial independence and judicial restraint thus work together hand-in-glove to channel judges’ attention to the factors that are actually relevant to the proper resolution of cases.

Much is at stake if the judiciary becomes too independent or too restrained, namely individual rights and the proper functioning of the government. Those who criticize courts advocate more restraint to ensure that judges do not exceed the scope of their powers. But at the same time, it must be stressed, as Justice Sandra Day O’Connor did in a recent speech, that a court’s ability to be effective depends “on the notion that we won’t be subject to retaliation for our ju-

dicial acts.”<sup>6</sup> The upside of judicial independence, then, is that it insulates judges who faithfully apply the law (albeit in unpopular ways); the downside is that judicial independence insulates judges who use their lack of accountability to shape the law in favor of their own preferred policies.

Criticism of courts comes in many forms, and recent years have witnessed many if not all of the variations. But if we compare the nature and intensity of today’s criticisms with the vitriol directed at judges in years past, it becomes apparent that they are not unique. Indeed, public critiques of federal judges have been commonplace throughout American history and, when done thoughtfully and honestly, they contribute both to a healthy democracy and to judicial independence.<sup>7</sup>

Congress has attempted to enact legislation that restricts or eliminates the jurisdiction of federal courts to hear certain types of cases. Congress’s power to do so derives from the Exceptions Clause,<sup>8</sup> which provides that “the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” The best-known of these limitations concerns review by federal courts of prior adjudications by other bodies, such as administrative agencies or state courts. In the early 1990s, the public (and some members of Congress) grew increasingly frustrated with what was perceived as federal courts’ penchant

for allowing state convicts to relitigate their cases in the federal system. In response to these and other concerns (including fears about terrorism), Congress in 1996 enacted the Anti-Terrorism and Effective Death Penalty Act (AEDPA).<sup>9</sup> Among other things, AEDPA limits the ability of federal courts to consider habeas challenges to state-court criminal convictions.

Similar concerns led Congress (also in 1996) to enact the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).<sup>10</sup> The IIRIRA prevents federal courts from reviewing a final order of the Immigration and Naturalization Service to deport a person with a criminal record, and expands the class of crimes that constitute an aggravated felony, including terrorism. More recently, in December 2005, just months before the Supreme Court was scheduled to hear the *Hamdan v. Rumsfeld* case, Congress passed and the president signed the Detainee Treatment Act (DTA),<sup>11</sup> which purported to remove from the federal courts jurisdiction to hear challenges brought by suspected terrorists to their detention and treatment at Guantánamo Bay. After the Supreme Court held in *Hamdan* that the DTA did not strip the courts of jurisdiction over habeas petitions pending during the DTA’s enactment, Congress and the president tried again. They passed the Military Commissions Act of 2006, which stripped federal courts of jurisdiction over Guantánamo detainees’ cases, including those that were pending.

The 109th Congress was asked to remove federal court jurisdiction to re-

6 Editorial, “Injudicious Intimidation,” *Detroit Free Press*, April 16, 2006.

7 Melvin B. Lewis, “Criticism of Court Challenged,” *Chicago Tribune*, October 16, 1985.

8 U.S. Const., article III, section 2.

9 Public Law No. 104–132 (1996).

10 Public Law No. 104–208 (1996).

11 Public Law No. 109–148, sections 1001–1006 (2005).

view the constitutionality of hot-button issues, like abortion. The Marriage Protection Act of 2005 intended to strip federal courts of jurisdiction to consider the constitutionality of the Defense of Marriage Act, which declares that no state shall be required to recognize legally same-sex marriages performed in another state.<sup>12</sup> Other proposals aimed to deny courts jurisdiction to assess the constitutionality of the Pledge of Allegiance<sup>13</sup> and public displays of the Ten Commandments.<sup>14</sup> While all of these measures failed to secure final passage by Congress, they have been reintroduced in the 110th Congress.<sup>15</sup>

Jurisdiction-stripping is not a new phenomenon. Congress has exercised the authority to strip federal courts of jurisdiction for centuries, and judicial independence has not suffered measurably for it. The Supreme Court's decision in *Ex parte McCardle* affirmed the power of Congress to restrict the jurisdiction of the Article III courts, upholding a law that removed from the Court's jurisdiction any cases appealed from circuit courts under the Act of 1867.<sup>16</sup> In fact, like the Detainee Treatment Act, which was passed while *Hamdan* was

pending, the law at issue in *McCardle* was enacted while the *McCardle* case was pending before the Supreme Court. And the judiciary responds when it deems necessary. For example, in the recent *Boumediene v. Bush* decision, the Supreme Court held that Congress unconstitutionally suspended the writ of habeas corpus by stripping the federal courts of jurisdiction to hear habeas actions of Guantánamo detainees.

Criticism of judges by politicians is not new either, but its frequency has picked up in recent decades. While virtually everyone agrees that federal judges may be impeached if they commit crimes,<sup>17</sup> in the modern era threats of impeachment often follow unpopular rulings. In 1996, Judge Harold Baer, a federal district judge in New York, ordered the suppression of evidence found during a traffic stop in New York City's Washington Heights neighborhood. The judge reckoned that, in that neighborhood, it was understandable for people to fear the police, and so the defendants' running did not give the officers a reasonable basis for searching the car.<sup>18</sup> Judge Baer's ruling was immediately denounced, by members of both political

12 Marriage Protection Act of 2005, H.R. 1100, 109th Cong. (2005); see also Defense of Marriage Act, 28 U.S.C., section 1738C (2000); James P. George, "Civil Law, Procedure, and Private International Law: Access to Justice, Costs, and Legal Aid," *American Journal of Comparative Law* 54 (2006): 315 n. 5.

13 Pledge Protection Act, H.R. 2028, 108th Cong. (2004), 109th Cong. (H.R. 2389), 110th Cong. (H.R. 699).

14 Ten Commandments Defense Act, H.R. 2045, 108th Cong. (2003).

15 H.R. 724; H.R. 699, 110th Congress (2007).

16 *Ex parte McCardle*, 74 U.S. 506 (1869).

17 See *Nixon v. United States*, 506 U.S. 224 (1993). A federal judge who was convicted at a criminal trial of making false statements before a federal grand jury sought judicial review of his removal from office. He claimed that the Senate had failed to "try" him within the meaning of the Impeachment Clause. (See U.S. Const., article I, section 3.) The Supreme Court held that Nixon's challenge presented a nonjusticiable political question because the Impeachment Clause also granted the Senate "sole" power to try impeachments. As such, judicial review of senatorial impeachment proceedings is inappropriate.

18 Don Van Natta, Jr., "Judges Defend A Colleague From Attacks," *The New York Times*, March 29, 1996.

parties. The Clinton administration called for the judge's resignation, while some congressional Republicans proposed impeachment. Several weeks later, Judge Baer reconsidered the case and reversed his prior ruling.<sup>19</sup> His critics were victorious.

More recently, former House Majority Leader Tom DeLay advocated impeachment investigations of several sitting judges such that Congress could be "a check on the court system."<sup>20</sup> The House Judiciary Committee has considered creating an office of inspector general for the judiciary, to investigate allegations of judicial misconduct. The goal of such proceedings is not necessarily to remove the judges from the bench. Rather, threats of impeachment can serve as a tool of intimidation, having a chilling effect that encourages judges to look over their shoulders when deciding cases.

While the volume of criticisms may be louder now than in the past, the fact is that federal judges have endured threats of impeachment for years. Perhaps the most famous example dates from the earliest days of the republic. In 1805, President Thomas Jefferson, a Democratic-Republican, supported an effort to impeach Justice Samuel Chase because he objected to Chase's Federalist jurisprudence.<sup>21</sup> The script will be

19 See *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996), overruled by *United States v. Bayless*, 921 F. Supp. 211 (S.D.N.Y. 1996); see also Robert Gearty and Tracy Connor, "Judge: Keep Cons Cool," *New York Daily News*, July 28, 2004.

20 See Anthony Lewis, "An Independent Judiciary," *St. Louis University Law Journal* 43 (1999): 292.

21 Stephen B. Burbank, "The Past and Present of Judicial Independence," *Judicature* 80 (1996): 117–118.

familiar to any observer of today's debates over the conduct of the courts: Jefferson attacked Chase for what he characterized as judicial rulings that went beyond what was required law; for his part, Chase saw the attacks as an attempt to undermine judicial independence. In the early twentieth century, President Theodore Roosevelt often criticized rulings of the federal judiciary that blocked his preferred social reform legislation.<sup>22</sup> Roosevelt's platform as a Progressive Party candidate in 1912 advocated the recall of unpopular judicial opinions and judges by popular vote. And, of course, some who objected to the Warren Court's rulings launched an advertising campaign, of which the most conspicuous feature was the "Impeach Earl Warren" billboards, in an effort to influence the Supreme Court justices. Federal judges have endured these criticisms with scant negative consequences for their independence, and there is no reason to suppose that today's threats will prove any more effective.

The Senate has always closely examined nominees to the federal bench, but recently even closer attention has been paid to prospective judges' ideological leanings. Historically, the Senate's scrutiny has not been strictly limited to nominees' professional qualifications, but also sometimes has included some inquiry into their general judicial philosophies. For years, the approach was to wave nominees through without much, if any, ideological examination. Until the 1930s, presidential judicial nominees were not even invited to testify before the Senate Judiciary Committee, and it was not until 1955 that testimony before

22 Michael R. Belknap, "From Pound to Harley: The Founding of AJS," *Judicature* 72 (1988): 81.

the Senate was compelled.<sup>23</sup> Prior to that point, nominees were not questioned about their positions on substantive legal issues. Still, for much of the latter half of the twentieth century, candidate questioning was mostly ceremonial, unless a particular nominee was controversial. Even as recently as Justice Ruth Bader Ginsburg's hearings, the nomination process was generally quiet; Ginsburg received careful scrutiny, but was not subjected to overly intrusive questioning. Indeed, at one point, Senator Strom Thurmond, who did not hail from the nominating president's political party, even encouraged Ginsburg to decline to answer any questions she believed could come before her on the Court: "Well, you don't have to answer it, then, if you feel that you shouldn't."<sup>24</sup>

Recent years have seen the Senate demand much more from judicial nominees; the Senate sometimes seeks assurances (implied, if not explicit) as to how nominees would rule in particular cases. Usually this takes the form of questions about the nominee's personal views on controversial issues of the day: abortion, affirmative action, the death penalty, the rights of criminal defendants, and other topics. This growing trend dates at least from the Robert Bork and Clarence Thomas hearings. Robert Bork was questioned regarding how his judicial philosophy would affect his interpretation of

key issues such as right to privacy, civil rights, gender discrimination, criminal procedure, separation of powers, anti-trust law, and labor relations. He also fielded questions about his personal views on such controversial Supreme Court decisions as *Griswold v. Connecticut*, *Roe v. Wade*, and *Brandenburg v. Ohio*.

This growing trend also was evident at the recent Roberts and Alito hearings. During Chief Justice John Roberts's confirmation hearings, one senator asserted that Roberts's lack of a paper trail as a judge required him to divulge his views on critical issues. But when Justice Samuel Alito came before the Senate Judiciary Committee, the same senator argued that Alito's sixteen-year record as a judge, and his correspondingly lengthy paper trail, necessitated that he be even more responsive than Roberts was.<sup>25</sup> When Roberts and Alito declined to tell how they would rule on particular issues, the senator accused them of dodging. Another member of the Senate Judiciary Committee asked Alito's opinion on *Bush v. Gore*, characterized as a "great example of judicial activism."<sup>26</sup> Both justices were questioned at length on *Roe v. Wade*. Nor is such pointed questioning limited to nominees to the highest court. Probing questions also are asked increasingly of appellate nominees.<sup>27</sup> Nominees are required to respond to a variety of inquiries ranging

23 Ibid.; William G. Ross, "The Questioning of Supreme Court Nominees at Senate Confirmation Hearings: Proposals for Accommodating the Needs of the Senate and Ameliorating the Fears of the Nominees," *Tulane Law Review* 62 (1987): 119.

24 *Nomination of Ruth Bader Ginsburg, to Be Associate Justice of the Supreme Court of the United States, Hearings Before the Committee on the Judiciary, United States Senate*, 103rd Cong. (1993), 145.

25 Jonah Goldberg, "Senate 'Show Trial' is Product of a Too-Powerful Court," *USA Today*, January 11, 2006.

26 Marcia Davis, "For Democrats, A Most Tender Roast of Alito," *The Washington Post*, January 11, 2006.

27 See William G. Ross, "The Judicial Appointments Process: The Questioning of Lower Federal Court Nominees During the Senate Confirmation Process," *William & Mary Bill of Rights Journal* 10 (2001): 119–120.

from their opinions on previous court decisions to whether they would adhere to particular precedents. Nominees also are asked their personal opinions on hot social and political issues and are queried about their opinions on issues they might need to adjudicate in the future.

This increased ideological scrutiny of nominees is problematic from the standpoint of both judicial independence and judicial restraint. It certainly is proper for senators to inquire about nominees' general judicial philosophies and interpretive methodologies. But asking about a nominee's preferred outcomes in particular cases – or trying to glean them from the nominee's views on prior precedents – may pose a threat to the proper functioning of the federal judiciary. The danger is that judges will come to be agents of the Senate's policy preferences, and that is no more acceptable than that judges should become the agents of the president's policy preferences. "By demanding to know in advance how a particular nominee will rule in a given kind of case, the political branches are exerting precisely the sort of direct control over the judiciary that Hamilton and the other Framers sought to avoid with the creation of a separate and distinct third branch."<sup>28</sup>

The Supreme Court seldom finds itself in unanimity on controversial legal questions, but all nine members of the Court agree about the dangers of judges precommitting themselves to particular outcomes. In the 2002 case of *Republican Party of Minnesota v. White*, the Court struck down Minnesota's Announce Clause, which prohibited candidates for elected judicial office from publicizing their views on disputed legal or politi-

cal issues.<sup>29</sup> The dissent acknowledged: "In the context of the federal system, how a prospective nominee for the bench would resolve particular contentious issues would certainly be 'of interest' to the President and the Senate.... But in accord with a longstanding norm, every Member of this Court declined to furnish such information to the Senate, and presumably to the President as well." That "longstanding norm" was "crucial to the health of the Federal Judiciary."<sup>30</sup> The majority did not dispute this, and only held that judges who wish to share their legal views cannot be *forbidden* from doing so: "Nor do we assert that candidates for judicial office should be *compelled* to announce their views on disputed legal issues."<sup>31</sup>

Recently the federal judiciary has been met with mounting criticism and a public that is increasingly skeptical of courts' ability – even their willingness – to do their job properly. Critics worry that the judiciary, the least accountable branch, is abusing its authority and exercising undue influence over the nation's political policy. In particular, critics see abuses of courts' authority in what is loosely known as "judicial activism" and "career judging." Calling the judiciary to task for these practices is not only not a threat to the courts' independence, it can be an important part of a robust democracy. Equally important, it can be a crucial part of safeguarding judicial independence: criticism can help ensure that judges perform only that role which has been delegated to them and consider law, not public opinion, when deciding cases.

29 536 U.S. 765 (2002).

30 *Ibid.*, 807 n. 1 (Ginsburg, J., dissenting).

31 *Ibid.*, 783 n. 11 (emphasis in original).

28 Diarmuid F. O'Scannlain, "Today's Senate Confirmation Battles and the Role of the Federal Judiciary," *Harvard Journal of Law and Public Policy* 27 (2003): 174.

The perennial criticism of judges is that they engage in judicial activism. Everyone seems opposed to judicial activism, yet no one agrees what it means. Some have branded as activist the Supreme Court's recent rulings on partial-birth abortion, homosexual sodomy, and the death penalty.<sup>32</sup> The Rehnquist Court was dubbed the most activist in history by some because of the number of federal statutes it struck down – more than three dozen federal laws.<sup>33</sup> And it was not just for its rulings that the Rehnquist Court was deemed activist, but for the manner in which it went about undertaking judicial review, namely its perceived reluctance to show some deference to the constitutional interpreta-

tions of Congress and the president before striking down democratically passed legislation.

Some elements are common to many understandings of judicial activism. It can involve (1) deciding a case on the basis of one's own policy preferences; (2) deciding a case on the basis of an *en vogue* philosophical theory;<sup>34</sup> (3) reaching out to decide an issue the resolution of which is not essential to the outcome of the case;<sup>35</sup> and (4) too readily discarding a prior precedent without considering whether it is entitled to stare decisis treatment.

This is not the place to define judicial activism with precision. Instead, my objective is to explain how judicial activ-

32 *Stenberg v. Carhart*, 530 U.S. 914 (2000), which holds that a Nebraska statute criminalizing partial-birth abortions was unconstitutional; *Lawrence v. Texas*, 539 U.S. 558, 577 (2003), which declares unconstitutional a statute that criminalized homosexual conduct; *Roper v. Simmons*, 543 U.S. 551, 575 – 578 (2005), which outlaws execution of persons who were under eighteen when their crimes were committed; and *Atkins v. Virginia*, 536 U.S. 304, 316 n. 21 (2002), which bans execution of mentally retarded defendants.

33 See, for example, Catherine Crier, "What Conservatives See as the 'Right' Stuff," *USA Today*, November 3, 2005; Christopher P. Banks, "Reversals of Precedent and Judicial Policy-Making: How Judicial Conceptions of Stare Decisis in the U.S. Supreme Court Influence Social Change," *Akron Law Review* 32 (1999): 247, 249: "[T]he ruling [of the Rehnquist Court] in [several cases] disclose[s] that the Rehnquist Court is engaging in a conservative brand of judicial activism"; see also *United States v. Lopez*, 514 U.S. 549 (1995), which strikes down the Gun-Free School Zones Act of 1990; *United States v. Morrison*, 529 U.S. 598 (2000), which holds the civil remedy provision of the Violence Against Women Act unconstitutional; and *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), which deems rights and remedies in the Americans with Disabilities Act unconstitutional as applied against states.

34 *Lochner v. New York*, 198 U.S. 45 (1905) (Holmes, J., dissenting): "This case is decided upon an economic theory which a large part of the country does not entertain. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*"; see also Christopher Wolfe, "Moving Beyond Rhetoric," *Florida Law Review* 57 (2005): 1080: "[N]either does [the Constitution] enact John Rawls's *A Theory of Justice* or Ronald Dworkin's *Taking Rights Seriously*. There is no requirement of moral neutrality in the Constitution, which left to the states the police powers to protect the safety, health, welfare, and morality of the community"; Keith Burgess-Jackson, "Our Millian Constitution: The Supreme Court's Repudiation of Immorality as a Ground of Criminal Punishment," *Notre Dame Journal of Law, Ethics, and Public Policy* 18 (2004): 409: "[T]he recent Supreme Court decision on sodomy, *Lawrence v. Texas*, shows that it all but enacts John Stuart Mill's *On Liberty*."

35 *PDK Labs., Inc. v. U.S. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring): "[T]he cardinal principle of judicial restraint – if it is not necessary to decide more, it is necessary not to decide more – counsels us to go no further."



ism, however defined, and the public's response to it relate to judicial independence. As mentioned above, judicial independence and judicial restraint (the opposite of activism) are inextricably tied to one another. Both aim to prevent judges from consulting extrinsic materials (whether public opinion or their personal views) when they decide cases. Seen in this light, public criticism of judges for activism is not necessarily a threat to judicial independence; it is a complement to judicial independence. After all, it remains the role of the legislature to legislate and the judiciary to interpret. An activist court "legislates from the bench," and thus "encroaches on the legislature's constitutional turf."<sup>36</sup> Legislating from the bench "destroys the proper end of judging and, therefore, is the greatest threat to judicial independence, the means to that proper end."<sup>37</sup> Criticizing judges for judicial activism is a way of reminding judges to perform their proper function – interpreting the Constitution – as members of the judicial branch. Criticism encourages judges to realize more fully the practice of ignoring irrelevancies when they decide cases, the same objective that judicial independence strives to achieve.

Up to this point, I have voiced some doubts that public criticism of judges poses a severe threat to judicial independence. But there is one way in which pervasive criticism of judges' decisions can

36 Michael D. Weiss and Mark W. Bennett, "New Federalism and State Court Activism," *Memphis State University Law Review* 24 (1994): 260, which cites Carl T. Bogus, "Pistols, Politics & Products Liability," *University of Cincinnati Law Review* 59 (1991): 1157.

37 Thomas L. Jipping, "Legislating from the Bench: The Greatest Threat to Judicial Independence," *South Texas Law Review* 43 (2001): 145.

compromise the independence of the courts, without offsetting benefits in the form of democratic participation or judicial restraint. A real danger exists that the publicly stated views of political elites – activists, the news media, and officeholders – will condition the environment in which judges operate, leading career-minded members of the federal judiciary to tailor their rulings to conform to the views of the politically influential.

The process by which career judges – those who seek promotion to higher or more prestigious courts – can internalize elite opinion is fairly straightforward. It is only natural that many state-court judges and judges on lower federal courts would seek to advance through the ranks. They know that presidents and senators historically have preferred to appoint judges who have previous judicial experience.<sup>38</sup> They also know that judges whose prior rulings have proved unpalatable to presidents or senators have had a harder time being nominated and confirmed to new judicial posts. Such career judges thus will have an incentive to placate the officeholders who they anticipate would play a role in their future elevation (as well as the private opinion-makers who would hold forth on their nominations). Career judges will have reason to decide cases based not just on their honest estimation of what the law actually requires, but also, at the margins, on their sense of what outcomes the political elites may favor.

My sense is that the threat here largely comes from members of the elite: the presidents who nominate judges, the senators who decide whether to confirm them, the journalists and editorialists

38 Luke Bierman, "Legal Development: Preserving Power in Picking Judges: Merit Selection for the New York Court of Appeals," *Albany Law Review* 60 (1996): 355.

who cover the process, and the activists who bring pressure to bear on their allies in office. The threat to judicial independence does not come from criticisms leveled by ordinary members of the public (except insofar as those citizens have the power, either individually or collectively, to move elites). Judicial independence has more to fear from an editorial in *The Washington Post* than from a posting by an anonymous blogger.

A few qualifications are in order. This analysis is not meant to malign the integrity of American judges, who in my experience strive mightily to resolve legal disputes in good faith and seek to minimize the influence of external considerations when they decide cases. It is only to recognize that judges are human beings and that, as humans, they are susceptible to self-interest as everyone else. Note also that elite criticism sometimes can have the opposite effect. It can cause judges to dig in their heels and refuse to buckle in the face of public sentiment. The need to maintain judicial independence notwithstanding the views of powerful elements of the public was one of the reasons the Supreme Court in *Planned Parenthood v. Casey* cited as a basis for retaining *Roe v. Wade*.

How, then, do we counter (or at least minimize) the natural incentive to curry favor with elites that is experienced by judges who hope for elevation to a higher court? A good starting point would be to lower the temperature of the judicial-appointments process. Judges who have no reason to fear that the president or Senate will scrutinize their rulings, line by line, in a hunt for evidence of ideological orthodoxy (or heresy), will be less prone to craft those rulings to be amenable to elite opinion. This is not a call for the Senate to abdicate its historically robust and important role in the confirmation process. It is only a call to focus on

nominees' general judicial philosophies and interpretive methodologies in lieu of their preferred outcomes in particular cases.

Few would dispute that judges must be "free to make decisions according to the law, without regard to political or public pressure."<sup>39</sup> But judicial independence is not a one-way street. We insulate our judges from day-to-day public pressures not because we want them to function as platonic guardians of the public interest, but precisely because in our constitutional system their role is so carefully circumscribed. In other words, the principal beneficiaries of judicial independence are not the judges themselves, but the litigants who appear before them in the hopes of getting a fair shake, and, ultimately, the American people who look to their courts for impartiality. Seen in this light, public criticism of the courts does not invariably present a threat to judicial independence, but actually can play a key role in ensuring that the judiciary remains independent. Such critiques are a way of calling on judges to remain faithful to their role as detached expounders of the law, and to eschew irrelevancies such as their own predilections and public opinion when deciding cases. As Chief Justice William Howard Taft cautioned, "Nothing tends more to render judges careful in their decisions and anxiously solicitous to do exact justice than the consciousness that every act of theirs is to be subject to the intelligent scrutiny of their fellow men, and to their candid criticism."<sup>40</sup>

39 Jipping, "Legislating from the Bench," 150.

40 Delivered at the Annual Meeting of the American Bar Association in August 1895; revised and published in the *American Law Register and Review* 43 (9) (1895): 577.