

# CONFERENCE ON RELATIONS BETWEEN CONGRESS AND THE FEDERAL COURTS

## A STENOGRAPHIC RECORD\*

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**STATE BAR PRESIDENT EYNON:** Good morning. My name is Richard Eynon, and I'm President of the Indiana State Bar Association. I'm pleased and privileged to be able to be the first person to address you in what proves to be a very exciting day, we hope, and I know it will be in our exchange with the Congress and the judiciary, and also academia is involved as well today.

There are some things that I need to do; some people I need to thank. First of all, I want to thank all of you who have come to participate in this Conference. The time that I've been allotted will not allow me to go through the list of distinguished guests, speakers, panel members, from Justice Alito on down, Chief Justice, and the federal court, so I will dispense with even attempting to do that. Those speakers and panelists will be recognized and introduced in a proper way as the day goes on.

I want to thank Dean Roberts for allowing us to use this wonderful facility for the purpose of this Conference. I want to thank his staff and the people here at Indiana University ("IU") for their hospitality.

I also want to thank the staff of the Indiana State Bar Association ("ISBA"). To put on a project such as this is not a diminutive matter. It is something that takes a lot of time. Our events chairperson, Ashley Higgins, should be commended for all the work she has done and the other members of the staff. If you have a chance to see Ashley, you might want to thank her. I know that I do.

I also want to thank Judge Magistrate Baker and the Federal Judiciary Committee members of the state bar who took what was an idea last October, and I mean it was just an idea, and have transformed that idea into reality for all of us today. The staff they have accumulated and the people that will be presenters today, it's an unbelievable staff, and they have put this together in what amounts to, from a planning standpoint, a very short period of time.

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There are a couple of housekeeping items that I need to talk to you about as well. Number one, as always, if you haven't turned off your cell phones, please do so now. Justice Alito has security, and other security people are here with our state people and the Congress representatives. We do not want to get anyone upset, so please turn off the cell phones; at best, vibrate.

Also, for any members of the press that may be here, I want to announce that as each presenter, speaker, or panelist comes forward, there will be allotted a two-minute period of time for the press to come up in the front and take whatever photos they want. At the end of the two minutes, you're asked to return to your seat. That will be enforced. We need to announce that ahead of time.

I, as I said a minute ago, am very pleased and I am as anxious as you all are to hear what will be presented to us today, not only from Congress and the judiciary, but from academia as well, as we have some speakers from that walk of life that I think will intersperse their knowledge and wisdom along with that of the other participants. I look forward to a very, very enjoyable conference and I hope you will do the same. Thank you.

*(Applause)*

**DEAN ROBERTS:** Should I wait for the two minutes for the press to come in?

*(Laughter)*

**STATE BAR PRESIDENT EYNON:** I did say distinguished, but no, no.

#### OPENING REMARKS

**DEAN ROBERTS:** Well, it's my pleasure to officially welcome you. I don't know how many of you even know who I am. I am Gary Roberts. I'm the new dean here. I've been on the job about ten weeks; it seems like about five years. But it's a great job, and I'm excited to be here to lead this School over the next several years to bigger and better things. I'm very proud of this School. I'm very proud of this facility, and I'm delighted that you all can be here to enjoy it with us today.

This is really an honor. It's my first opportunity to host an event at the Law School, and what a great one it is for my first time out of the blocks. So, we're going to have a beautiful day outside. When this is all over today, you can go across the street and enjoy the Irish Festival, but until then we're going to have a fabulous program.

I was going to go through and thank all the people. This is a great opportunity for me because I get to stand up here and be your host and welcome you, and I didn't have to do a thing. The folks at the Indiana State Bar Association did it all. And Tim Baker, who is the chair of the organizing committee, did a fabulous job. I know I worked with our Associate Dean and Professor Jeff Grove, who was our representative on that committee, who did a great job. Ashley, I was in touch with her, and she was working around the clock. So, all of these folks who worked so hard to make this a great event deserve our appreciation.

I know you didn't come here to listen to me, so I will stop at that point and just tell you that I hope you have a great day. It's also my privilege now to

introduce our first speaker, who is a terrific young member of our faculty, a real rising star in legal academia.

Gerard Magliocca came to this Law School about six years ago, in 2001. He started out as an undergraduate and graduated from Stanford, and then unfortunately he couldn't get into a good law school, so he went to Yale. He got out in 1998, clerked for Judge Calabresi on the Second Circuit for a year, and then he went and joined my old law firm in Washington, D.C., Covington & Burling for a couple of years, and then he came here in 2001.

In the short time he's been here, he has been phenomenal. He's won teaching awards. He's been a prolific author, several articles. And I promised him I would hawk his book for him today—

*(Laughter)*

—Andrew Jackson and the Constitution.<sup>1</sup> Gerard is not only a constitutional law scholar and an intellectual property teacher, but he is also a legal historian. This is his first book. And I asked him if he was going to have a book signing during the reception today, but he said he's already out of them. It's already a best seller. So, I guess you'll have to go on Amazon.com to get a copy. But Gerard is going to talk to us today about the Chief Justice on Capitol Hill. So, I'll turn it over to Gerard Magliocca.

*(Applause)*

THE CHIEF JUSTICE ON CAPITOL HILL: OPENING A DIALOGUE  
BETWEEN THE BRANCHES<sup>2</sup>

Professor Gerard N. Magliocca  
Indiana University School of Law—Indianapolis

**PROFESSOR MAGLIOCCA:** Well, good morning. Thank you, Gary.

I want to thank you all for coming and echo the comments made earlier about everyone who has worked so hard on this really terrific event. I think in the six years I've been at the Law School, there's never been a collection of speakers brought here like we have today. So, I hope you're all excited to be here.

Now, I think the reason that we're holding a conference on this topic of relations between Congress and the federal courts is that there is a feeling, though it hasn't quite ripened into a conclusion, that something is not quite right with how the branches are relating to each other. It reminds me of when I used to work in the press relations office of the State Department.

When we had no idea what was going on in a particular country, the instructions we were given was to say things were calm, but tense.

*(Laughter)*

So that might be a good characterization of how relations between Congress

1. GERARD MAGLIOCCA, *ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES* (2007).

2. Gerard N. Magliocca, *The Chief Justice on Capitol Hill: Extending the Humphrey-Hawkins Model*, 41 IND. L. REV. 299 (2008).

and the courts are going these days.

While there are comments about this issue from several quarters, perhaps the most forceful points have been made by Justice O'Connor. Since she retired from the Court, she's been talking quite a lot about judicial independence. Indeed, she wrote an op-ed in the Wall Street Journal not too long ago in which she said, "The breadth and intensity of rage currently being leveled at the judiciary may be unmatched in American history."<sup>3</sup>

Well, as a legal historian, I have to say that I think that statement is almost certainly wrong. Indeed, by historical standards, relations between the branches are quite good. We don't see a court-packing scheme the way we did during Franklin Roosevelt's administration. We don't see the impeachment of federal judges for partisan reasons as we saw during Thomas Jefferson's presidency. And we don't see broad efforts to strip the federal courts of jurisdiction the way we did during Reconstruction.

We don't even see the sorts of irritating burdens that Congress used to routinely inflict on the federal courts. Some of you may know that in the nineteenth century, Supreme Court Justices were required to ride circuit, which meant that for several months out of every year they would go around a particular set of states trying cases and hearing appeals. This part of the job was the one thing that made most people not want to be a Supreme Court Justice at the time. Not only was travel very difficult, being bounced along via stagecoach, but actually there are many instances in which justices were seriously injured by being thrown from a coach, and they would break an arm or they would break a leg or, in Chief Justice Marshall's case, break a collarbone.

Congress, when they didn't like what a particular justice was doing, would often expand the territory that they had to ride around in or reassign them to one that was bigger.

*(Laughter)*

We don't even see that sort of thing today. Nonetheless, I think we have some reason to be concerned. And so, in my talk today, I want to make three points about the current situation.

First, while I think things are going reasonably well between Congress and the Supreme Court, relations between Congress and the district and circuit courts have deteriorated. Now, ordinarily I would describe those courts as lower federal courts; but seeing as there are actual federal judges here, I will not use that term.

*(Laughter)*

Second, I think that this problem is a result more of congressional inaction or neglect than congressional action. And, in this respect, that makes the current situation different in kind from earlier problems between Congress and the courts.

Third, I think that the solution to this inaction or neglect is to create some mechanism, some more powerful mechanism, by which the concerns of the judiciary can be expressed to Congress and vice versa. And in that vein I want

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3. Sandra Day O'Connor, *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A1.

to suggest, or this is sort of the proposal of the talk, that Congress and the Chief Justice collaborate on a system by which he would testify in his capacity as the head of the Judicial Conference on a regular basis, much like the chairman of the Federal Reserve currently testifies before Congress on the state of monetary policy.

Now, by way of background, typically relations between Congress and the courts reach a low point during periods of political realignment when you have the elected branches and the courts controlled by different and sharply divided constitutional philosophies. This is something that doesn't happen very often. It's usually a once every generation kind of phenomenon, and it was described best, I think, by Justice Jackson when he talked about the conflict between the New Deal and Franklin Roosevelt and the Supreme Court in the 1930s. He said,

The judiciary is thus the check of a preceding generation on the present one; a check of conservative legal philosophy upon a dynamic people, and nearly always the check of a rejected regime on the one in being. . . . This conservative institution is under every pressure and temptation to throw its weight against novel programs and untried [problems].<sup>4</sup>

I figure if you're going to have a lengthy quote, it might as well be from Justice Jackson.

*(Laughter)*

Now, what's going on today does not fit this paradigm. There has not been a realignment; there is not sharp division of the kind we've seen in previous periods. Certainly that time will come again as it has many times before. But if that's not the issue, which normally explains why there are problems between Congress and the courts, what is?

Well, I saw a federal circuit judge that I know not too long ago, and I mentioned to her that I was going to be giving a talk at this Conference. So, I asked her, "What do you think about relations between Congress and the courts?" And her response was, "Well, we can write terrific opinions pointing out problems in federal statutes, issues that Congress should be looking at, but does anybody read them?" Specifically, she wondered does anybody in Congress read them.

That got me to thinking that in the past the problem of judicial independence has always been one of Congress or the President taking actions to try to control the courts and limit their autonomy, some of the examples I mentioned earlier. But today I wonder if the problem isn't that the Congress and the President aren't paying enough attention to the problems of the courts. That, too, can erode their autonomy in a significant way.

I'm going to give you two examples of what I'm talking about, one of which is probably familiar to many of you and the other which probably is not. The first is judicial salaries, an issue that some people here have a vested interest in. For many years now the Chief Justice, Chief Justice Rehnquist, and then Chief Justice Roberts, have spoken about the failure of Congress to index judicial

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4. ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 315 (1941).

salaries for cost of living and have noted that the failure to do so has led to a decline in the real value of these salaries. They are concerned, and other justices have expressed this concern as well, that it's harder to attract quality people to the bench. Though in fairness, I think that's probably true more in high cost-of-living areas than just everywhere. And there have been some high-profile instances of judges leaving the bench for private practice or for other jobs, in part because of salary concerns.

So far there hasn't really been any action on that. In part, this is because, according to the current framework, the salaries of judges are tied to the salaries of members of the Congress. You have to have one go up for the other to go up, and that creates certain problems. So, that's an issue that has gotten a lot of attention. The Chief Justice has written about this in his annual statement on the judiciary. In fact, he did so in January of this year.

Now, the more complicated example relates to the status of immigration asylum appeals. You cannot speak to a federal circuit judge these days for any more than about five minutes before they start talking your ear off about this terrible problem and why is it that nobody does anything about it. So, I thought I'd take the opportunity to sort of educate you a little bit about this. Obviously, if you're an immigration attorney, you probably already know, but for those of us who aren't, it's not something that's going to be in the news so much.

After September 11, the Department of Justice decided to streamline the procedures for processing petitions for political asylum by immigrants. Specifically what they did was they cut the size and budget of the Board of Immigration Appeals, which is the administrative appellate body that hears claims coming from immigration judges who have adjudicated a claim for asylum.

As a result of this cut in budget and size, the Board of Immigration Appeals simply does not have the resources to actually conduct a thorough review of cases from immigration judges. So, what they have done, basically, is turn to issuing one-sentence affirmances, just affirmed, stamp, and that's it.

Under the current statutory framework, petitioners who have been denied asylum can then take an appeal from the Board of Immigration Appeals to the federal circuits directly. This has resulted in a flood of appeals coming to the federal circuit courts, which have often a highly undeveloped record because all they have is what the immigration judge said. Now, I don't mean to disparage immigration judges; they're overworked, too. But, oftentimes they are not putting together a written opinion; they're not really putting together much of anything other than an oral description of "here's why I'm denying your petition for asylum." The circuit courts are immensely frustrated by having to review the record on this basis and are also frustrated by the fact that what was essentially an administrative task has been transferred to them.

Now, if you look in the materials that I provided for the CLE materials for this Conference, you'll see a long list of citations of recent court of appeals opinions in which judges are using very harsh language to describe what they're getting from the immigration judges and the failures of the system to adequately review and screen these cases. In this circuit, Judge Posner, some of you may know, has been very, very forceful in essentially saying that due process is not

being given to these applicants by the immigration judges and that, as a result, the reversal rate is quite high, approaching 50% in these cases.

There has been a report by the Judicial Conference asking for action to deal with this problem. There is a long list of opinions specifically asking for action. Nothing has happened. And to be fair, this is not entirely the fault of Congress. The executive branch also has the power to deal with this issue and hasn't done anything either.

Again, you can, to some degree, explain this by saying this issue, when it gets considered, tends to be tied up with the bigger issue of immigration reform, which is, of course, very difficult. But it raises a question both with respect to the judicial salary problem and with respect to this immigration appeal problem, why is nothing happening? What's the problem?

Well, I think the answer is that it's very difficult for these sorts of issues to sort of break through into the public consciousness or at least reach the consciousness of Congress, given all of the other issues that are out there in the public square. Now, note that this is not a problem for the Supreme Court. When the Supreme Court speaks, everybody pays attention. Indeed, even a single Justice can put an issue on the agenda in a separate opinion simply because the amount of activity by the Supreme Court is so low and because generally they're dealing with higher profile questions. This doesn't mean they always get action, but they at least have a better prospect of getting action.

By contrast, the work of the circuit courts and district courts is more bread and butter in nature. They're regulatory cases, they're immigration cases, they're intellectual property cases. They're not the types of subjects that are going to get a lot of attention in the media even though they're very important to the litigants involved and also for vast areas of public policy.

The other thing is that there are a lot more federal judges now than there used to be, and, thus, one particular federal judge has a more difficult time in raising an issue, or even, let's say a handful of judges, than used to be the case. Some of you may remember reading opinions by Learned Hand back in the day, and in his day there weren't very many federal judges. And, thus, it was possible for someone with stature in a prominent court to issue opinions that would get the attention of the bar and of Congress. Now it's just a lot harder. It's not impossible, but just much more difficult, I think, because there are so many voices out there.

Of course, there are ways for circuit and district court judges to communicate their concerns to policymakers. They can write opinions. They can come to events like this where we'll have members of Congress and there will be a chance for informal communication about matters of concern. The Judicial Conference also attempts to issue written reports on problems that they perceive.

But I don't think that these traditional tools are working so well. And we need to have some way of raising the profile of these concerns that the circuit and district courts have, both in the media and in Congress.

Professor Geyh, who you will hear from later today, has one proposal to deal with this which is to create an inter-branch commission of some kind made up by some judges, some members of Congress, whether current or retired, that could look at issues and then propose solutions for congressional action. So, since he

already came up with that idea, as I found, when I was doing research on this, I've got another idea I want to try to pitch.

And that is that the Chief Justice, who, by statute, is the head of the Judicial Conference, should volunteer to give testimony to Congress on a regular basis about issues of concern to the district and circuit courts. Now, this is not entirely unprecedented. Some years ago Chief Justice Berger, who many of you may know was not exactly known for his modesty, proposed that the Chief Justice give a speech every year to a joint session of Congress—a big event, and he would be kind of marched down the aisle just like the President is. Well, that didn't really go anywhere.

*(Laughter)*

But I think the idea behind it has some merit. The model that I'm looking at for how this could work is the testimony given by the chairman of the Federal Reserve to Congress. Under the provisions of the Humphrey-Hawkins Act of 1978,<sup>5</sup> the Fed chairman is required to come before the relevant committees of Congress twice a year to give testimony on monetary policy.<sup>6</sup> Usually this means he gives a statement and then takes questions. This statute was put in because there was a thought that it would help improve the transparency of the Federal Reserve and also would allow for better communication between Congress and the Fed on issues of mutual concern. Because, obviously, the Fed has an interest in Congress's fiscal policy, just as Congress has an interest in the monetary policy of the Fed.

Now, clearly the Federal Reserve chairman is not a constitutional officer as the Chief Justice is. However, in practical terms, the Federal Reserve is as powerful and as independent as the federal courts. That is sort of the institutional practice that has developed over the last ninety-some years since the Fed was created. So, I think it's appropriate to look to his role as an analogy here.

Now, when the chairman of the Fed testifies before Congress, there are some informal ground rules about what he will or will not comment on. For example, he won't comment on matters that are within the jurisdiction of the Treasury Department, such as exchange rate policy, and he won't comment on highly partisan issues like "what do you think about Iraq" or "what do you think about the proposal of the President on something like Social Security." Finally, he's not going to say whether they're going to raise interest rates next week.

Even with these limitations, I think most people in the financial community view these hearings as useful. They have improved the transparency of the Fed, and they have improved the dialogue with Congress even though sometimes it gets contentious, particularly in periods when the economy is not doing well or when interest rates are high.

I think that the same system could work for the Chief Justice, although there are some relevant distinctions. First, obviously, or it seems obvious to me, that consistent with separation of powers, Congress could not compel the Chief Justice to appear the way that they have with the Fed. He would have to

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5. 15 U.S.C. § 3101 (2000).

6. *Id.*



volunteer. Granted, he might look forward to this as much as going to a nervous dentist; however, there are some precedents for this. Earlier this year, Justice Kennedy testified voluntarily before the Senate Judiciary Committee on various matters, including judicial salaries. Every year usually two Justices come to the House to testify about the Court's budget, which is a venue for getting asked other questions that are unrelated to the budget.

Now, if the Chief Justice were to testify as the Fed chairman does, how would that work? Well, in some ways it wouldn't be all that much different from what the Chief Justice does in his annual statement on the federal judiciary, which is a written statement. That is, presumably he would come up with whatever consultative bodies that he would want to rely upon and try to forge a consensus on what issues ought to be presented or given a higher profile.

When he testified, there would again have to be some informal ground rules about what he could or could not say. Obviously, we would not expect the Chief to comment on pending cases. Obviously, we would not expect the Chief to comment on the constitutionality of pending legislation. And I think, also, a very important point is that we would not expect him to endorse a specific solution to a problem that he has identified or that his colleagues have identified. Because this would present some difficulties if the Chief Justice came out and said, "Well, I think the answer to the immigration asylum problem is X," that would create a significant conflict-of-interest problem should that solution then be challenged subsequently in a case, right? I mean, for one thing, somebody in a brief could cite, "hey, the Chief Justice said it was a great idea to somebody." But, also, it would put the Court in a difficult position should they have to rule on constitutionality of that matter. So, I think this would have to be limited to identifying problems and perhaps offering up some ideas without sort of coming down and saying, "Oh, well, we should do this," or, "We should do that."

Now, I think that such a hearing would be valuable for a couple of reasons. First, it would, by virtue of the fact that it's the Chief Justice or some other dignitary that he might designate, say another Justice, it would get a lot of attention. It would be covered on C-Span. It would be covered on cable news. And a lot of the issues that would ordinarily not get the attention of the public would be presented to them. The same could be said for Congress, which would get a chance to hear about problems that they might otherwise just not really be able to recognize.

Second, it would allow for Congress to air its views about what's going on with the courts. Granted, some of that might involve some grandstanding based on whatever the latest unpopular decision was, but there might be some value in that. Because one would think that in a dialogue sort of context, rather than just going out and issuing a press statement or something, you actually might get something productive out of that.

You know, people often comment when Justices are up for confirmation hearings that, "Oh, it's this wonderful educational opportunity for Congress, for the American people," and so on. Well, yes, it probably is. It's just unfortunate that that can only happen once every X number of years and is sort of random as to when it occurs. I think there would be some value to having an institutionalized practice where this dialogue could occur in a more formal,

structured way.

So, in conclusion, I would say that really we need to spur action on problems of concern to the judiciary. That's really, I think, the source of the problems that we are having, and we need to find some mechanism for doing that.

Now, this is just one suggestion on how one might do this. There are certainly lots of others. But I think that it's fair to say that neglect is just as pernicious as an affirmative act to injure an independent judiciary. And I think that's one of the topics that I hope will be out there on the table for the rest of the discussions today.

So thank you very much for your attention.

*(Applause)*

I gather there might be some time for questions, if there are any, or we could just take a longer break.

**MAGISTRATE JUDGE BAKER:** I have a question for you, Professor. What do you think the chances are that the Chief Justice would think that's a good idea?

*(Laughter)*

**PROFESSOR MAGLIOCCA:** Well, I don't know. And I suspect that nobody much likes going before Congress to be grilled in a hearing. I doubt that the Federal Reserve chairman sort of skips up the Capitol steps when he has to do this.

The question is: Is this a useful solution to the problems that are out there? I don't know. The Chief Justice was a big hit when he went through his confirmation hearings, so perhaps he would be more inclined to do it than most. I don't know. Obviously that's a tough question, and I think one would have to be persuaded of the merits of the process to say, in effect, "Okay, I'm going to submit myself to something which would be time consuming and wouldn't really be a whole lot of fun."

Nevertheless, I think that that's not really the controlling question. The question is sort of, well, he's the head of the Judicial Conference and that gives him certain responsibilities to act on behalf of his colleagues in the federal judiciary, and there may be other ways to do that that are better, but I think something should be done in this respect.

**PROFESSOR GROVE:** Are there any risks here that you can imagine?

**PROFESSOR MAGLIOCCA:** Well, I think so. I think certainly since it would be—well, I think one potential risk would be the conflict-of-interest risk that I mentioned.

Now, another risk would be, do you think, that there are, in fact, common concerns among the federal judiciary? Some people might argue, look, the federal judiciary is a very diverse body with lots of different opinions about issues. Is it really the case that you'd be presenting a consensus position, or is it the case that you'd just be presenting the Chief Justice's position on various matters? And I think that's something in which great care would have to be exercised. It's easy to identify some core issues like higher salaries that probably would get a consensus. But, yes, I think there would have to be great care exercised to make sure this doesn't just become a vehicle for the Chief Justice to express his personal views about what ought to be done with the federal

courts.

I guess the only other risk I can think of would be the extent to which members of Congress would focus their questions on the Supreme Court rather than on the purpose of this hearing, which would be about what's going on in the district courts and the circuit courts. I mean, I don't know that I would say, well, you can't ask the Chief Justice about something related to the Supreme Court, but I would hope that in setting this up everyone would understand that, look, the point of this is to help out the folks who really need the help, namely, circuit judges and district judges. But that's a problem which hopefully one could deal with just through sort of informal discussion. I mean, all of this, obviously, would have to be constructed through informal discussion since it can't be required by Congress.

Yeah, Henry.

**PROFESSOR KARLSON:** One of the concerns I have is traditionally courts have tried to be in the background. In other words, not use a bully pulpit which is traditionally the political arm of government.

Isn't there a risk that this could involve, at least in the minds of the public, more in the political process and thereby in the minds of the public, lose some of their independence and, in fact, their credibility?

**PROFESSOR MAGLIOCCA:** Well, I think that that problem is out there. But if it's focused on the kinds of issues that typically arise in circuit and district courts, I don't think it's a problem because it's not going to deal with the more controversial topics that are going to sort of engage the credibility problem in the way that you're describing. At least, you know, that would be my hope as to how it would be framed. I mean, there is some risk of what you're talking about.

**PROFESSOR KARLSON:** What I am really talking about here is not how it will start, but how it will end, the evolutionary process in which this will become more and more a bully pulpit over the period of time and again making the court more and more political in the minds of the public.

**PROFESSOR MAGLIOCCA:** Right. Well, keep in mind that this would be the Chief Justice acting in his capacity as head of the Judicial Conference and talking about matters that are not at the Supreme Court level.

Now, it is true that judicial lobbying presents problems, partly for conflict-of-interest reasons, partly because we want judges to not be taking the lead on policy issues. On the other hand, there are a number of precedents for judicial lobbying with respect to getting the Supreme Court certiorari jurisdiction; for example, they lobbied for that. The bankruptcy, the creation of the bankruptcy courts, was something which Chief Justice Berger was very interested in.

So, I think it's more a question of what issues are going to be involved. And I think that there would have to be sort of, in effect, an understanding that certain issues would not be drawn in, for example, things that the Supreme Court are doing, things that are really more a focus there than a focus in the lower courts.

So it is a risk that would have to be taken into account.

Yes.

**PROFESSOR GROVE:** We all know that good, institutional relations are sometimes based in part on good personal relations and relationships. The idea of bringing the Chief together with members of Congress, in maybe a cozy sort

of setting, is a good idea. And I think in that respect your proposal has a lot of appeal.

My concern is will it be possible to really distinguish between the Chief's role as the Chief Justice and, on the other hand, as the head of the Judicial Conference?

And also, I wonder whether this could be the occasion for differences between the branches simply to be publicly flogged.

**PROFESSOR MAGLIOCCA:** Right. Well, I suppose the question is: What do you think promotes relations better, open discussion or each side more or less shouting at each other through other means? I tend to view the solution as being more about putting the issues out there and discussing them. That may be naive, but I suppose I do come down on that side.

Now, it is true, as you say, that, well, this might bring to the fore certain differences or heighten tensions—some senator browbeats somebody, that sort of thing. But I think overall it has been an effective model with respect to the Fed. And, granted, there are different concerns. There are concerns, for example, to go back to Professor Karlson's point that the Federal Reserve chairman might act as a lobbyist for certain economic policies or political views, and that sometimes was expressed, you know, when Greenspan was the chairman. But I think it's been pretty successful there, and I think it can be pretty successful here.

Certainly it's possible you could have a more informal model. Maybe rather than having an open hearing, you have a closed hearing; or rather than having a hearing, you have a kind of get-together of some kind. That could work, too. Although, I do worry that that sort of thing might not have the public punch that a hearing would have.

But that's an interesting point. I think 9:20 is the time we have to stop. So, thank you very much.

*(Applause)*

**DEAN ROBERTS:** One of the things I was thinking about as Gerard was speaking is if there's any group whose voices are heard less than federal judges, it's law professors. So, I'm hoping that somebody is paying attention to what you have to say, Gerard.

We have to take a break, and I'm told we're going to stay on schedule, so it's got to be a ten-minute break. We'll be back right at 9:30.

*(A recess was taken.)*

#### THE VIEW FROM THE CAPITOL

Panelists: U.S. Representatives Mike Pence, Baron Hill, Brad Ellsworth

**PROFESSOR GROVE:** Good morning. Welcome again to everyone, especially Mr. Justice Alito who is here in chambers and will be coming in anytime now.

Let me begin this part of the program by introducing the members of our panel and myself. I'm probably the only one who actually needs an introduction. I'm Jeff Grove. I'm on the law faculty here at IU Law in Indianapolis.

With us today are three United States Representatives. I'm going to do this in order of seniority. First of all, Honorable Mike Pence, who is a graduate of our Law School. He's a fourth-term congressman representing Indiana's Sixth Congressional District in eastern Indiana. He is a self-described Christian, conservative, and Republican, in that order. He's a member of two very important House committees, the Foreign Affairs Committee and the Judiciary Committee, which I think will stand him in good stead today.

He's also emerged not only as an influential leader in his own party, but also has led some important bipartisan efforts. I'm thinking in particular about his spearheading bipartisan support for the federal shield law for journalists. In a brief exchange we had this morning, I understand that that is moving forward in the Senate, being marked up. It may actually make headway.

Anything you'd like to add to that?

**CONGRESSMAN PENCE:** Next week, maybe for consideration next week.

**PROFESSOR GROVE:** Congratulations for that.

Honorable Baron Hill, who was first elected to Congress in 1998. He served three consecutive terms, took a hiatus, and is back now serving his fourth term. He is a Blue Dog Democrat, which is described on his website as a coalition of moderate to conservative Democrats who seek common-sense solutions, strongly advocate fiscal discipline.

He represents Indiana's Ninth in southern and southeastern Indiana. Serves on the House Energy and Commerce Committee and the Science and Technology Committee.

Baron, welcome.

And finally, Honorable Brad Ellsworth, a first-term Democrat, also a member of the Blue Dog coalition, represents Indiana's Eighth Congressional District, sometimes known as the "Bloody Eighth."

*(Laughter)*

He serves on the House Agricultural Committee, Small Business Committee, and Armed Services Committee. And he was named a little while ago by a newspaper in Washington called The Hill.

**CONGRESSMAN ELLSWORTH:** I've got to go.

*(Laughter)*

**PROFESSOR GROVE:** He was named—actually, I mentioned this to his staff and said I understand Brad was named as one of the fifty most beautiful people—

*(Laughter)*

**CONGRESSMAN ELLSWORTH:** Have a big heart.

**PROFESSOR GROVE:** —on the Hill and I was quickly corrected, no, he is the first of the fifty most beautiful.

*(Laughter)*

**PROFESSOR GROVE:** But that follows his—

**CONGRESSMAN ELLSWORTH:** Obviously, it's not true. Look at my—

*(Laughter)*

**PROFESSOR GROVE:** I believe this is the prettiest panel.

*(Laughter and applause)*

You know, before that Brad was known as “Sheriff Dreamy” down in Vanderbilt County.

*(Laughter)*

**CONGRESSMAN ELLSWORTH:** That wasn’t on my website, was it?

*(Laughter)*

**PROFESSOR GROVE:** It’s not. But if you go to his website, you’ll find many links to his photographs.

*(Laughter)*

**CONGRESSMAN ELLSWORTH:** Let’s get on with the panel.

*(Laughter)*

**PROFESSOR GROVE:** You’re a good sport. Thank you for coming here today.

I said in the materials that I prepared to have distributed that each of these congressmen represents more than a quarter of a million people. That’s technically correct, although it’s probably more like 500,00 or 600,000 people these days. I’m still working back in the last century, and I need to get this updated. So, more than a half million Hoosiers are represented by each of the congressmen who are with us today.

Thank you for coming. We really appreciate it.

Senator Lugar was in discussion with Tim Baker and some others about the possibility of coming today. It didn’t pan out, but he did send a very nice letter, which I think is in your materials, but I promised I would read out and I’d like to do that.

Dear Conference Attendees: It is my pleasure to welcome you to the Conference on Relations Between Congress and the Federal Judiciary being hosted by Indiana University School of Law, Indianapolis. I’m especially pleased Justice Samuel Alito and former Senator and U.S. Ambassador Dan Coats, along with other notable judiciary representatives from Indiana are attending the Conference.

A strong and vibrant judiciary is essential at all levels of government and today’s event enhances the dialogue that is so valuable in maintaining our strong institutions. I commend the Indiana State Bar Association for sponsoring this event and bringing you all together.

I regret I’m unable to attend this most important gathering but extend my best wishes to everyone in attendance.<sup>7</sup>

I think before turning to our panel, and really my job here today is to try to promote some discussion and moderate that discussion, that maybe I will just say a couple of things by way of introduction. Again, some of this, I think, is in the materials you received.

It’s very clear that the allocation and balance of powers between Congress and the federal courts is a key component of the constitutional structure of our national government. The powers vested in Congress affect the judiciary in a

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7. Letter from Richard Lugar, U.S. Senator, Indiana, to Conference on Relations Between Congress and the Federal Courts Attendees (Sept. 14, 2007) (on file with Indiana Law Review).

variety of ways. Federal judges come into their robes only if the presidential nomination is confirmed in the Senate.

Congress retains ultimate authority within constitutional limits for regulating the subject matter jurisdiction of the federal courts, the business of the federal courts. I think that's not a terribly controversial proposition, though I think it's more clearly true with respect to the—Gerard didn't want to say lower federal courts, and I don't want to say inferior federal courts, it's just the way it's described in Article III, right?

**CHIEF JUDGE MCKINNEY:** Exactly.

**PROFESSOR GROVE:** But I think it's clear that Congress has the ability to expand and contract, within constitutional limits, the subject matter of the federal courts, certainly in the lower federal courts; and there's also some opportunity for regulating the Supreme Court's appellate jurisdiction, although it seems to me this is a much stickier area.

Congress decides how many judgeships will be created, determines the number of Supreme Court Justices, which has ranged anywhere from six to nine over time. The federal judiciary looks to Congress to appropriate money, if the finances work, to create judgeships, to pay salaries for courthouse facilities, and to provide funds for all manner of systemic activities that take place in the judicial branch.

At the same time, Article III judges enjoy guarantees of life tenure on good behavior and, short of impeachment, are also guaranteed compensation which shall not be diminished during continuation in office. Although, the appropriate levels of judicial pay remain, maybe controversial, but certainly widely discussed.

We know that federal courts and ultimately the Supreme Court exercise the power of judicial review of the constitutionality of legislative enactments. And, you know, this is a very dramatic role. It's sometimes been characterized as counter-majoritarian. I mentioned in the materials that Professor Bikel—I misspelled that but I have it right in my notes here—called judicial review a deviant institution. On the other hand, I think it's often hailed as crucial protection for minority rights. But it's still controversial, and I think that various jurisdiction stripping proposals, that I hope we can talk about, will attest to that.

Finally, we know that the work of the federal courts also implicates the structure of our federal system in the relationship between the national tripartite government and the various state governments. And clearly, both Congress and the federal courts have the responsibility within the ambit of their respective powers and their prudential deployment of those powers to do what they can to protect the federal system that's in place.

So, with that said, let me raise a couple of questions with the panel. I'd like to start with a couple of fairly broad questions. I hope they're not too broad. If they are, I hope you'll tell me.

It's been almost 220 years since 1789, and in that time the Supreme Court has invalidated 160 congressional statutes in whole or in part. But forty of these statutes were struck down in a recent period of only twenty years, 1981 to 2000, and this is a trend that has continued apace. From what I could ascertain, it appears that in the last twenty-five years or so, judicial invalidation of

congressional statutes has reached something like a high-water mark.

So, I guess the question is: What explains this phenomenon? I mean, has Congress become insufficiently attentive to its own responsibility to try to take the constitutional measure of legislation it enacts, or are the federal courts overreaching in their role of judicial review, or can this be explained in some other way?

Gentlemen?

**CONGRESSMAN HILL:** Want me to start? First of all, thank you for the invitation to appear before you. It's a humbling experience for me to look out in this crowd and see people I've known for a long time, including my worthy opponent, Ambassador Coats. It's very nice to see you.

But as I look out, I see Judge Stanton, Judge Young, Judge Barker, Justices Shepard and Boehm and Sullivan. And Justice Alito, it's very nice to have you where God himself was born, in Indiana.

*(Laughter)*

But, your question, it was the most difficult question on the list of questions that you had for me to answer. I don't have as clear an answer to that question as I do to some of the other questions that you had.

I did take the time to do some research and find out what statutes have been overturned by the Supreme Court in the last twenty years and to see if there was some kind of pattern. But I saw no pattern whatsoever. It was statutes concerning Indian tribes, casinos, civil rights issues. So, my answer is I have no answer as to why that is happening. You all, because you're involved in the legal profession, probably have better suggestions to offer than I would have.

But if I would make a guess, it would be an empty guess. I can't conjecture because from the cases that I looked at or the statutes that I looked at, there was no clear pattern as to why this was occurring. So, I don't have an answer to it.

**PROFESSOR GROVE:** Mike, do you have a comment?

**CONGRESSMAN PENCE:** Yes. Thank you, and thank you, Professor Grove, thank you for inviting me back to my alma mater. Although we didn't have any rooms this cool.

*(Laughter)*

The place across the street was a dump.

*(Laughter)*

Some of you went there, I know. No, it wasn't, I'm just kidding.

It's wonderful to be home. In particular, as Baron just said poignantly, to be among so many jurists who I respect so deeply. Our Chief Justice and Justice Alito, it's good to see you again. And the supreme source of law and authority, Judge Barker is here.

*(Laughter)*

So, I'm really very humbled to be here, but will try to be candid and straightforward about some impressions.

I think there has been a growing distance, Professor Grove, between the two buildings, the Capitol building and the Supreme Court building in the last forty-some-odd years. We evicted the Supreme Court somewhere around the turn of the century across the street, and it seems like things have not gone well. When we were the landlord, it seems like we all got along well and worked things out.



But there's some truth to that. There's just some truth that there's some distance. Justice Alito would attest to this, but I see this almost great chasm in that little street that separates the Capitol. There's not a lot of interaction. Justice Alito and Justice Breyer came to the Judiciary Committee not long ago on an issue we may talk about today, but it was a marvelous discussion.

Actually, I think I said in the hearing that I thought the tape of this ought to be played in every civics class and every eighth grade government class in the country because it was such a wonderful interplay between the people's representatives in the judicial branch and the people's representatives in the legislative branch. It was a dynamic discussion and respectful, but it just doesn't happen that often. There's just not a great deal of interaction.

So, some of the incoherence of that, I think Baron accurately observes, is I don't think there is consistent communication. I know in the legislative process, some issues we've been working on—one I've been working on, issues like the Media Shield Bill<sup>8</sup> or trying to find a way to give residents of the District of Columbia a representative in Congress—you find yourself trying to more read the tea leaves in the process as opposed to anything even remotely akin to the informal communications that animate much of the national government.

I will say just to start the ball rolling, I was at the Supreme Court on Monday and saw the great John Marshall statue in the basement, chiseled on the wall with a quote that says something like, "It is the role of the Court to say what the law is." And I read that and was inspired as an American, and then I thought that's kind of our job.

*(Laughter)*

That may be the—

*(Laughter)*

That may be the whole problem.

Wrong.

*(Laughter)*

So I think there's a tension there, and we can elaborate on it. I really do think with some of the decisions in the 1960s, the Supreme Court reached into the classrooms of every jurisdiction in America and said our school children couldn't bow their heads and pray for God's blessing on their teachers and their parents.<sup>9</sup> The Supreme Court in 1973 struck down the hard-fought, hard-passed laws prohibiting abortion in every jurisdiction in America,<sup>10</sup> upending what Susan B. Anthony and others had begun as a political and legislative process a century earlier with one fell stroke.

There's been a litany of decisions that have created a greater tension between the two branches of government, and it's been some of that tension, and the attendant separation I think, that may account for that rise.

**CONGRESSMAN ELLSWORTH:** Thank you. As a freshman member, you have to excuse things like that. I'm still flustered from the introduction.

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8. Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. (2007).

9. *Roe v. Wade*, 410 U.S. 113, 116 (1973).

10. *Engel v. Vitale*, 370 U.S. 421 (1962).

*(Laughter)*

I was trying to think, I guess, there were worse lists in Washington, D.C. I could have been on.

*(Laughter)*

I think you know what I am talking about.

*(Laughter)*

I'm really glad that I was here for the first presenter. I was going to bring up the raises and be in all favor until I heard Congress was inactive and neglectful. Now forget that raise.

*(Laughter)*

It's also good to be here with the Justice and Mr. Shepard. Thank you, Ambassador, and Judge Young from Evansville, a long-time friend who we run with quite regularly.

I think we're all a product of our upbringing, of our surroundings, what we do. I was in law enforcement for twenty-five years, brought up in a career that taught me to respect the judicial branch and to comply and abide by what they did. I didn't always agree with the judge's decision, but it always made me want to do my job better the next time so that the judge or the jury would agree with me. I think that's the driving force.

I'm not as overly concerned with the trend that you bring up. I think it's healthy. I think it shows that the branches are separate and do work and that the check and balance is there. I think a lot of us in Congress are driven by what we hear from the folks at home. We are out there, and, with no disrespect, I know some judges in the room have to run for their office and some do not, but I would say that Mike, Baron, and myself go out among the people holding town halls, sitting in grocery stores at a card table, inviting the people to come up and say what they want us to do.

So, they're not constitutional experts; I sure don't claim to be a constitutional expert or scholar. We try; we do our best to comply, and certainly you don't want to embarrass yourself by going against the Constitution. But we're also driven; when you run for office every two years, you're driven by those people in the grocery store and those people in the town hall that come up to you everywhere and tell you you ought to do this or you ought to do this, why isn't there a law for this? And if you want to keep your job, that sometimes drives what you do and what you propose and what you legislate.

Like I said, I think we want to keep in line with what the Constitution says, but there's also that if I'm wrong, the Supreme Court will tell us, or the district court, or whoever it might be. So, I try to do things that the people want me to do, that I feel the majority of the folks sometimes will think, and then what my heart allows me to do, or my common sense, if there is any, and that's what drives me.

So, it is different—but I'm encouraged by the system that it is a check and balance, and it will vet itself out.

**PROFESSOR GROVE:** I agree with you, Baron and Mike, it's not easy to detect a clear pattern in the last twenty or twenty-five years. I do think the Supreme Court's Eleventh Amendment has certainly had an effect here, essentially enlarging, some might say, the immunity of states to sue in federal

courts. Of course, the vision that the federal courts have of Congress's constitutional powers under the Fourteenth Amendment, I think, has also undergone some rethinking and maybe some revision. But beyond that, I think it would be hard to nail that down.

A related question I wanted to raise has to do with the role of the federal courts vis-a-vis state and local governments. Many here today will recall that Judge S. Hugh Dillin of the Southern District of Indiana had an order in place for more than thirty years before it was dissolved having to do with the busing of school children in the Indianapolis area for purposes of achieving racial balance. In that sense, Judge Dillin was asserting some very important control over local schools and school policy. The estimable Judge Sara Evans Barker, who is here today, having found that conditions and overpopulation of the Marion County Jail had become constitutionally impermissible, had an order in place for some time bringing judicial oversight to the jail and, in fact, from time to time ordered that there be a discharge of prisoners in order to bring the population within constitutional limits.

So, I suppose my question here—and again, it's been very broad, and we'll try to get it a little more specific—are these so-called, we call them sometimes institutional remedies because they're remedies that are designed to affect public institutions, state and local institutions. Are the federal courts exceeding the authority they have or should have when they invoke these kinds of institutional remedies?

**CONGRESSMAN HILL:** I guess we have an order here, don't we?

I don't think I have any means or reasons why I'm ever going to be in Judge Barker's court, but I do want to answer this question the best I can in case I do get in her court.

*(Laughter)*

Ironically, decisions to decrease the prison population and the busing issue are issues that I agree with. Whether or not they should have had a judicial remedy is a question mark for me.

If I am Brad Ellsworth, and I'm the sheriff down in Vanderburgh County, and I have control over my prison population, I don't think I'm going to be very happy when I have a federal judge order me to release some of those prisoners.

So, the question becomes: Is this a judicial remedy, or should it be a political remedy? I happen to believe it ought to be a political remedy. Because in the final analysis, whatever Brad Ellsworth decides to do, he's going to be held accountable by the people.

As judges, who basically don't have to face reelection, not being held accountable, they can make decisions in the interest of good justice, which is probably the right thing to do. I'm not sure that that authority ought to be transferred to unelected people. I think ultimately that the Brad Ellsworths of the world need to be held accountable for the decisions that they make and that they have jurisdiction over.

So I'm at odds here with some of the decisions that have been made at the judicial level.

**CONGRESSMAN ELLSWORTH:** Thank you, Baron.

I can remember vividly, and Judge Barker and I just talked about this before

the panel started, about how closely in Vanderburgh County, as the sheriff, we watched the decisions that were going on with the Marion County jail, very concerned about what happened.

Coming up in law enforcement, again, you were very close to the people and the phone calls about what was going on and do you release, are we releasing, too many. We were in a very overcrowded position, too.

What I was more concerned with was that, of course I didn't want the responsibility of saying I'm going to let these people out, then it's all on my back. So, having a judge say you have to cap it at 329, or whatever the number is, was helpful, because then I could say it was just that federal judge, see, that bad person.

*(Laughter)*

They're the ones that let the rapist out and the burglar out that then broke into your home.

What we were very concerned with down there—and you also have to relate that to the county commission, the county council—were any unfunded mandates. I think we got more nervous about where the money was coming from in a county that was losing its tax base or staying at least level on tax base. And then to be told you have to add—and I'm just making numbers up—thirty-five new people, take on that payroll, or we're going to order you in the next two years to build a county jail at \$35 million. That's pretty tough.

We were very fortunate in Vanderburgh County; everybody was working together. We had a federal lawsuit and working closely with our federal judge and the courts, a very understanding judge that knew the predicament there.

So, I look at that; it makes you very nervous. But, again, it is that check-and-balance system. The Constitution fairly doles that out—the responsibility—to the federal judges to oversee and look over what we do. And again, I applaud the check-and-balance system. Like I said, I wasn't always in agreement with every decision, but we learn to comply.

**PROFESSOR GROVE:** Judge Barker, I know you'll be on a panel this afternoon—

**JUDGE BARKER:** Just you wait.

*(Laughter)*

**PROFESSOR GROVE:** That's why I wanted to say, of course; you're entitled to equal time immediately if you want.

**JUDGE BARKER:** I'd rather hear from the representatives.

**CONGRESSMAN PENCE:** As I said, I think Baron is being way too conservative on this.

*(Laughter)*

I do have a real concern, as I said in my first response, about the tendency—and not this case in particular—of the federal bench to engage in what, in effect, ought to be decided at the political arms of the federal government.

Now, I will tell you that it does seem to me, compared to what the Constitution says about cruel and unusual punishment, that there is a unique burden that the courts have to ensure that the people that are incarcerated by the state are afforded treatment and care. There seems to be this special issue there

that is certainly debatable.

What is not debatable to me was the federal court out west, I think it was in Kansas City, that ordered the City to raise taxes to spend more money on local schools.<sup>11</sup> This was a decision some five or seven years ago, which to me was just—it is preemptive action by the federal court over the school board, over the county council, over the state legislature, over everyone that's involved in developing the funding stream for local schools. It ought not to supplant the ordinary and sometimes excruciatingly slow process of developing public will behind those things.

I think in that school district, if memory serves, it was almost a doubling of per-pupil spending that was ordered. SATs have since gone down in that jurisdiction. So, I think we—I think, you know, where there are rights of individuals protecting the rights of persons within the United States of America and the protection of the Constitution, the court is within its purview. But where the court is coming in and supplanting its judgment for the judgment of people at the township, county, state, or federal level, to be deciding how assets are distributed, I think that there should be much more restraint than has been shown in many jurisdictions around the country in recent years.

**CONGRESSMAN ELLSWORTH:** Just one more thing so I don't get accused of kissing up too much: I can remember as an elected sheriff and wanting to be elected again, when questions like this would come up about cases in particular; and you have three or four news stations and six or seven radio stations that have mics in your face; and when you don't comment, then it's with that sarcastic tone, "unavailable for comment," or whatever it was. I know it was always kind of a burr under the saddle when the judges could say, "I can't talk about that because I can't speak in regards to a case."

So, when they made a decision for something—I'm not even sure this happened in Vanderburgh County—but I always said, "Why do they not have to answer to their decision to let these people out and go in front of the cameras? I have to and they don't." So I heard that comment a lot or a lot of criticism or at least complaints in that arena.

So, it was always a concern to us I'm the one having to explain these decisions. I might say that I don't like them, I don't agree with it, but the judge wouldn't have to go on TV and explain why they made that call.

Sorry, Judges.

**PROFESSOR GROVE:** I think I detect some general agreement among the panel with respect to these matters that we've just been talking about, at least with respect to the responsibility of the elected officials to keep track of what constituents want and they are entitled to have. On the other side, the federal judges are exercising their powers in ways they deem appropriate. It seems to me this is the kind of tension that can never be washed away completely. It's sort of inherent in the system we have.

I would like to ask more specifically about a proposal that my colleague, Gerard Magliocca, made earlier today. I know you were here, Brad. And I'm not

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11. *Missouri v. Jenkins*, 495 U.S. 33, 50-58 (1990).

sure when you came in, but Gerard took the long view and I think suggested that maybe tensions between the branches are not as serious now as some believe, and historically that may be true. I think not everyone is that sanguine about it. I think there is very real concern about whether relations do need to be improved and how to do that.

Gerard's suggestion was that the Chief Justice be invited to appear before Congress on a regular basis—not in his capacity as the Chief Justice, but as the head of the Judicial Conference—and create an opportunity for dialogue between the branches in this way. I just wonder if any of you has a thought about whether that seems like a good idea.

**CONGRESSMAN PENCE:** Well, as long as we do it like Tony Blair does it in the Parliament—

*(Laughter)*

—no holds barred.

*(Laughter)*

I think that would be very constructive within certain parameters. I do think that the dignity that ought to attend the federal bench does not lend itself to the wide-open, sharp elbows that we all enjoy in Congress and in most hearing settings.

But I do think, for instance, the Chief Justice's annual report—you know, there was a time that the State of the Union was just tendered in paper to the Congress and somewhere, the historians would know, the President started coming down the street and making a speech.

I had the occasion to visit with our Chief Justice, who is a Hoosier, Justice Alito—

*(Laughter)*

—and had a very warm conversation about issues, one issue we may talk about today. That particularly was an issue he focused, I think, the entirety of his annual report on. I would venture if we surveyed members of Congress, including the Judiciary Committee, and gave them a pop quiz about what the Chief Justice of the Supreme Court's annual report focused on, nine out of ten would fail the quiz.

So, creating a setting where the Chief Justice could present to the Congress, I think, might be a very intriguing way to start that dialogue. There's just something—I don't know, maybe all three of us are from south of Highway 40—something Brad said resonated with me, just a certain deference to the court: I would be a little hesitant about putting the Chief Justice of the Supreme Court on the grill before a committee like a confirmation hearing. It seems to me that would not be in the public interest, but increasing the flow on an annual basis back to Congress would naturally create a certain dialogue in and of itself that I don't think exists today.

**CONGRESSMAN ELLSWORTH:** I think, first, we have to ask—this was probably my favorite question that they proposed—what we hope to achieve by this. As a new member of Congress, I don't think you—and I'm not accusing these two of this at all, there's that inside-the-beltway mentality that after seven months I've seen, you know, what goes on in these hearings. And you all have watched it over the last several days with General Petraeus, but thanks to C-Span,

you see it every night—or hopefully you don't.

*(Laughter)*

I think it's extremely important—goes back to the first question—to keep the judiciary out of the political fray. And I've got to be honest, my interpretation of Washington is there's a lot of political fray.

You've seen the hearings on TV when they have a guest or a witness that comes up there. Like I said, I'll go back to General Petraeus most recent because I think everybody watched that. As they moved around the tables at the House and the Senate, both sides of the aisle, I'm extremely bipartisan, non-partisan here, most members took the entire—they've got the five-minute rule, and that is supposed to be your question and the answer in a period of five minutes in fairness to all members. As everybody witnesses, usually the member talks for about four minutes and forty-five seconds about his position, either bashing the witness or telling what his position is already, and then leaves sometimes fifteen seconds for the question and then submits it for the record or gives them a chance, and they usually go over. That occurs in almost—well, every hearing I've been in so far.

So I think honestly doing this, what we're doing here today, doesn't have to be the Chief Justice. It could be people, you know, federal judges that agree to get together, local judges that agree. You all know the issues we're talking about; we've got the list in front of us. Let's discuss it; let's have an interaction back and forth. It doesn't have to be in front of a C-Span camera. I see we're taking notes here; that it's on the record. That's okay. But less formal where we can sit down, you don't have a little red light in front of you that says you have only five minutes to get your position out, and do it that way.

I make my decisions a lot of different ways. The war in Iraq, I talked to a troop at the Yellow Tavern in New Harmony a couple weeks ago and then last week flew to Iraq and talked to Iraqi generals and listened to General Petraeus. You take it all in to make a decision so many different ways. I find this for me more helpful than a congressional hearing and what some would call a dog and pony show, which is what a lot of the hearings turn out to be.

**CONGRESSMAN HILL:** I think I would echo what Brad and Mike have said. I don't think it's a bad idea to carry on a dialogue with the Chief Justice and Congress. I guess it depends on how it's structured.

I mean, if we're going to make the Chief Justice take an oath and all that sort of thing, grill him, that's not a good idea. Communication is a good idea. But if Congress is going to be on a witch hunt with what the judiciary is doing, I think that's a bad idea.

In Indiana we have the State of the Judiciary. I've listened to Justice Shepard give many of those when I was in the legislature, and I think that's a good idea. Maybe it's something that we could think about at the federal level, that there be a State of the Judiciary in addition to the State of the Union address.

So dialogue is important. But as it relates to oversight of the executive branch, there is precedent for this. Both the White House and the legislative branch are in a political environment. Because of the President, I think it's appropriate that Congress have oversight of what the executive branch is doing, but I wouldn't extend that to the judiciary. If there's wrongdoing going on within

the judiciary, we have a process called impeachment to take care of those kinds of things.

**PROFESSOR GROVE:** Thank you for saying that. Actually, that does come to a matter I wanted to ask about. Maybe now is the time to do it.

As you say, Baron, we're aware of many recent efforts by the Congress to exercise oversight over the executive branch. I'm thinking about congressional reaction to controversies such as the firing of a number of U.S. Attorneys by former Attorney General Gonzales, executive authorization of terrorist surveillance programs, and the attempts Congress has made to bring executive department officials before Congress, if necessary to issue subpoenas, to hold out the threat of contempt.

The question, I guess, is whether there's any reason that Congress can't conduct oversight hearings of the judicial branch. I take it from your last comment, Baron, you would worry about that, wouldn't think that would be appropriate. But what do others think about that—the idea of hailing federal judges before a congressional committee and trying to find out, for example, why are you refusing to pay heed to congressional intent? Does this make any sense at all or doesn't it?

Mike, do you have a thought about that?

**CONGRESSMAN PENCE:** I just have a reaction. I think—I hope there's no reporters in the room to see how often I agree with Baron Hill.

*(Laughter)*

Brooks is here.

*(Laughter)*

All kidding aside, I have some hesitation about doing that. We have very clear powers in the Constitution for impeachment. If there's cause, we can initiate in the Congress the removal of a judge. But I think, for me, the proper role for the Congress is to be as assertive on the jurisdictional issues before the fact than to be reconsidering decisions—to essentially put ourselves into the judicial branch as a new court of appeals, which is I think what we would be doing if we would be taking action that would be just as extra-constitutional as, what I accuse the judiciary of doing, reaching into the legislative process.

I don't think we should be a court of appeals, but I do think—and I've co-authored legislation to use clear constitutional power—that Congress has to limit the scope of jurisdiction of the courts relative to subject matter. In that case I think that's perfectly appropriate. That's before the fact. And it would give guidance to courts, particularly in areas that I co-authored, what we called the Constitution Restoration Act,<sup>12</sup> which took a run at essentially saying that the courts would not have jurisdiction where a public official or public entity's acknowledgment of God was the case in controversy.

I will say to you, without going on a tear here for sixty seconds, I think the greatest threat to the judiciary in the twenty-first century is a public perception of elitism. All people have to do is take a vacation in Washington, D.C. and see the Ten Commandments displayed in the Supreme Court, a bust of Moses in the

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12. S. 520, 109th Cong. (2005).



House of Representatives, to see the Supreme Court open in prayer, to see the Congress open in prayer, and then to realize in Winchester, Indiana, you can't do those things because of decisions by the federal courts.

I would say with deep and profound respect, and I see no one in this room that I don't respect, that I think that kind of elitism will tear at the fabric of the credibility of the judiciary in the long-term. By elitism, I mean whenever the people see people in power saying we can endure exposure to certain things that you cannot be permitted to be exposed to, namely the acknowledgment of God in the public square even in a way that reflects the accommodations tradition pre-1960s in Supreme Court cases.

I just can't help but feel that using the Congress, not reviewing court cases and becoming another court of appeals, but on the front end saying to the court, "Look, we are a nation whose institutions presuppose a Supreme Being, our founding documents refer to a Creator, capital C, and all the previously referenced acknowledgments indicate that we simply do not want the federal courts reviewing in cases and controversies where the acknowledgment of God is the subject." I think that would go a long way toward defeating a widening sense of that elitism, and I think that would be important.

**PROFESSOR GROVE:** All right. Let's talk about that subject for a few moments, congressional efforts to strip the federal courts of jurisdiction. Incidentally, that idea that I floated about the congressional oversight hearings for the judiciary—that's not something I'm proposing, just an idea I wanted to put out there for discussion.

These jurisdiction-stripping bills, some of them have different twists. I'm not going to go through the list of bills that are contained in your materials, but just say a couple of things more generally about them and then invite a little discussion.

Three of these bills—Sanctity of Life Act,<sup>13</sup> We the People Act,<sup>14</sup> Public Prayer Protection Act<sup>15</sup>—provide that any decision by the federal courts in cases wherein the jurisdiction has been removed would also treat decisions by the federal courts as non-precedential. I assume preexisting precedent would no longer be binding according to the provisions, at least in these three bills.

That is to say if the courts decide to act in the areas where jurisdiction has been withdrawn, their actions will not carry force of precedent; presumably preexisting precedence would not be binding. In fact, one of these bills, the We the People Act, threatens impeachment of federal judges if they were to attempt to exercise jurisdiction in an area that has been removed by federal statute.

It seems to me that these bills seek to counter the familiar principle that federal courts do have jurisdiction to determine whether they have jurisdiction. And I think threats of judicial impeachment really, really do raise the stakes here. This may not—I don't know if you would be willing to go that far, Mike.

It is true that some of these bills have made progress. They've been passed

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13. H.R. 776, 109th Cong. (2005).

14. H.R. 300, 110th Cong. (2007).

15. H.R. 4364, 109th Cong. (2005).

in the House, some by a significant majority. So, they have not been taken up by the Senate. Who knows what will happen next. But I guess the question is, you know, what is there to be said about these congressional efforts to strip the federal court subject matter jurisdiction in certain cases or categories of cases?

I take it, Mike, your comment certainly addressed that. Is there anything more you would like to say or other members of the panel? Does Congress have the power to do that? Assuming it does, is it a good idea? And maybe more important, what is driving this?

**CONGRESSMAN PENCE:** Let me, with the indulgence of my two colleagues, maybe just let them ponder that question for a few more seconds.

On the subject of impeachment—there's a lot of hot rhetoric that comes in these bills—I don't recall endorsing efforts to look backwards in the law and prohibit or threaten impeachment. I don't think that's altogether constructive.

I will say that this business of the courts having the power to determine the jurisdiction that they have—that's not entirely what the Constitution says. It says that the Congress sets the jurisdiction of the federal courts. There's express language in the Constitution that we have the power to do that. In fact, it's actually very routine that we do that.

In my seven years in Congress, and Baron knows because he's actually arrived in Congress a few more years than I did, earlier than I did, we very routinely will pass legislation, the tail end of which will include a whole range of descriptions of what the courts have jurisdiction over and what they don't. My way of thinking, it's never been subject to court challenge, never even been a subject of controversy. The Congress very routinely passes legislation exercising their authority to set the jurisdiction of the courts.

The larger issue is, to me, and maybe I'm just making more of a plaintiff cry to a lot of you who are in positions of great responsibility and some of you who will be before you know it, and this is a bond that we three share, a bond of faith, a bond of common traditions, we splice them a little bit differently some days when we vote, but there's no difference in the core values, belief in the importance of faith in God and family and really what makes our close relationships possible. There is a sense among millions of Americans that the courts have been attempting to eradicate any acknowledgment of God from the public square on just kind of a consistent basis over the last thirty and forty years. And that flies in the face of that accommodation as tradition in the Supreme Court for years and years and years where the public square was open, open to all faiths, no faith.

But the sense that the freedom of religion has been interpreted by the courts to be an enforced freedom from religion is deeply offensive to millions and millions of Americans, and I believe if there is going to be some counter reaction to that. I would prefer that it came from the court. I would prefer that at some point in the not-distant future the court reaffirm in some powerful and plenary way an accommodations doctrine for the twenty-first century and recognize the importance of the acknowledgment of faith in the public square and that we weren't flipping microphones off when the graduation speaker at a high school graduation begins to talk about her faith in Jesus Christ, which actually happened

because the school was so fearful that they would be violating federal law and court decisions.<sup>16</sup>

So I really have a sense that the public is growing more and more weary of that and my hope is that the court will address that. But I'll continue to be a part of efforts in the political side of the House, the legislative side of the House, to carve out room for the acknowledgment of faith in public square, and using the jurisdiction clause of the Constitution, I think, is the most effective way to do that. But it's not as effective as the court as a group coming to understand the sensitivity of the public on that issue.

**PROFESSOR GROVE:** I think, if I could interrupt, I think the orthodox argument for congressional power to expand and contract the jurisdiction of the inferior federal courts is that Congress has the power to create them initially. That's not true with the Supreme Court, although there is the regulations and exceptions clause with respect to the Supreme Court's appellate jurisdiction.

I wonder, do you see a difference between congressional attempts to limit or remove certain categories of subject matter jurisdiction in the lower federal courts and efforts to limit the appellate jurisdiction of the Supreme Court?

**CONGRESSMAN PENCE:** Yes.

**PROFESSOR GROVE:** I mean, I think the argument has been made a number of times, and it rings true for me for what that's worth. Over time the Supreme Court has developed, really as its core function, the final decisions about the meaning of the Constitution. This is a function that has become so integral to the work of the court and to the court's role within our national, and not just national, but in our national government and federal system to try, to take too much of that away, it seems to me, presents real problems and a little different from the ones we think about in connection with the kind of bills that would strip the lower courts.

Although it is true that most of this proposed legislation would affect the Supreme Court's ability to hear these cases as well.

**CONGRESSMAN HILL:** Let me begin by saying, Mike, that just because you agree with me doesn't mean you're going to be damaged goods. Everything is going to be okay.

*(Laughter)*

I guess we're getting to the point where we're going to depart from agreeing with one another here, right now.

I have always voted against the bills that would strip the courts of jurisdiction over certain issues and, quite frankly, was attacked for it politically. I voted against the bill that would strip the courts of hearing cases as relates to gay marriage. My opponents turned that into meaning that I am for gay marriage, which I am not personally. I just don't think that that should be in the Constitution. To say that the Supreme Court is barred from hearing those kind of cases seems to me to be a departure from the separation of powers. I have a feeling that if we passed a statute like that and it was challenged in a court of

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16. See *Valedictorian Unplugged Over God Comments—She Says It Was Free Speech, Officials Say It Was Preaching*, MSNBC.COM, June 21, 2006, [www.msnbc.msn.com/id/134613081](http://www.msnbc.msn.com/id/134613081).

law, that the courts would rule it unconstitutional.

But I do believe that people need to have a way to find relief other than just the legislative way, and the courts are designed to give people an additional avenue of relief. To say that, for the legislature or the Congress to say that that person does not have that opportunity for relief at the judicial level seems to me to be unconstitutional.

I'm not a lawyer, of course, but that's just the way I see it.

**CONGRESSMAN ELLSWORTH:** Just briefly, I was glad Mike gave me that moment to ponder, and Baron, because I just argued with myself about three or four times back and forth playing a game of Ping-Pong. I was thinking that we have to be very careful about how we make these steps in challenging every judicial decision and creating laws to do that. Then I hit the ball back to the other side and just remembered as late as a couple weeks ago there was a case, Goodyear was the plaintiff, I think—I don't remember, what was the other?<sup>17</sup> Where the lady had made the claim that she was unfairly paid over a period of eighteen years, Goodyear or something like that—we voted, and I voted for that.

It wasn't out of disrespect for the judiciary. They interpret law. I just thought we can clean this up for them and make that more clear. They decided rightly; let's change the law to make it so that this pay discrimination would not come into question again. I voted in favor of that amendment.

So I've kind of batted it back and forth, which doesn't clearly state a position, but something we do have to think a lot about.

**PROFESSOR GROVE:** We're beginning to run a little short on time and, Mike, as soon as you—

**CONGRESSMAN PENCE:** Can I make one other comment? There's one other piece of that that I've seen Congress act effectively on and that was, I think, the recent eminent domain case and controversy<sup>18</sup>—deeply offensive to many of us who see that power as a power to condemn property for public use. And the Supreme Court ruled that the government could use that power to transfer private property from one person to another for private use.<sup>19</sup> Congress was almost unanimously opposed to that. I think unanimously.

In the other way, you know, the power of the purse is really the Article I power that we have. And I think what Congress did very effectively was pass legislation rapidly that said the Supreme Court has made its decision, but any city or jurisdiction that utilizes this authority will not be eligible for federal grants and support. Interestingly, no one has used it yet.

*(Laughter)*

So it's not just about the jurisdiction issue, which I think I struggle with, and I agree, they're problematic to a certain point but they're part of a frustration many of us feel trying to carve out room for the acknowledgment of our Creator, God, in the public square particularly, but at the same time this other issue shows there are other weapons that the legislative branch has. In that case I think thus

17. *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007).

18. *See Kelo v. City of New London*, 545 U.S. 469 (2005).

19. *Id.*

far has used fairly effectively.

**PROFESSOR GROVE:** Thank you for speaking frankly about your views on that.

Two other matters I would like to introduce in the time we have left: One, judicial salaries; the other, cameras in the courtrooms.

The Judicial Conference allows the federal courts of appeals to decide for themselves whether to televise their proceedings and their arguments. We're familiar with cameras in state courtrooms in a number of places. We often hear, particularly members of the press, urge that it's very, very important that the transparency of the Supreme Court proceedings be encouraged. One way to do this would be to bring television cameras into the courtroom and to televise proceedings in general.

My question is: Does Congress have the power to regulate this? And if it does, is it a good idea?

I would just draw the question maybe a little tighter by noting that, I mean, if your answer to those questions is yes, you're at loggerheads with at least eight of the sitting Justices and then the supine or perhaps prone body of the ninth, Justice Stephens, who has said they will enter his courtroom over his dead body.

*(Laughter)*

There is a very strong feeling about this, I think, within the courtroom. Should Congress do this or shouldn't it?

**CONGRESSMAN HILL:** I'm not in favor of cameras being in the courts. So, if you watch Congress—there's a difference between a journalist reporting what's going on either in the courts or in the Congress and you having a live presentation. I just think the live presentation invites sensationalism and theatrics. We've got enough of that in Congress; I don't think we need that in courts. So, I just think it's a bad idea.

Whether or not Congress has jurisdiction over that kind of thing, I think that is a question that has not really been answered and would have to be challenged in a court of law if we actually did something about putting cameras in the courts. So, I can't answer the question.

But generally speaking I think cameras, especially in the Supreme Court, is a bad idea.

**CONGRESSMAN ELLSWORTH:** I think the jury is still out on this, also. No pun intended. I think we're doing the right thing in Indiana. We've got test courts. I don't think it's being used a lot from what I've been reading in *The Courier* just this last week. But, as Baron said, people act differently when there's a camera. The lawyers will act differently, the defendants act differently when the live—I'm all for public, the light being shown on the public goings-on, but I think that is one where I would take the input of the judges to help make that decision on how they felt that it impacted their court and the decision-making process before I would make a decision and/or vote for that.

But the record is there. There's nothing hidden in a court proceeding, just whether you put it on a television show is really the only difference there. Reporters are allowed in there; there's nothing hidden. So, again, my input would come from the experts sitting on the bench before I would make any decision.

As far as whether the Congress has the authority? Believe me, someone will try it and try to pass it. Then it comes down to the individual.

**CONGRESSMAN PENCE:** I was for cameras in the courtroom until that judge in the Anna Nicole case.

*(Laughter)*

That was a joke, but you all groaned.

I am really perplexed. I am solidly on the fence on this one, because I really believe in open government. Professor Grove mentioned some work I had done in that area in terms of increasing transparency. I've done work on trying to reform earmark legislation. Colleagues have supported those efforts to try to create greater transparency. I think daylight is a great antiseptic.

Frankly, when I was the plaintiff in the lawsuit that challenged the McCain-Feingold case, my footnote in history was that it was *McConnell, Pence, et al., v. FEC*.<sup>20</sup> I had a great seat in the Supreme Court for oral arguments. I had never been over there. I am not just complimenting Justice Alito because he's here, and his colleagues, right front and center. I was dazzled by the acumen. I want cameras in the conference room at the Supreme Court.

*(Laughter)*

Forget the Court.

But, I mean, it was very enlightening. It was very exciting as an American to see the intimacy and the seriousness and the professionalism and the deference of the lawyers and the Justices. But I share my colleagues' concern, particularly with my friend who was in law enforcement. There is serious business going on there, and it's something that becomes very serious when cameras are present. We live with that every day.

I love C-Span; it was founded by a Hoosier, Brian Lamb, proud of it. But you talk to the old-timers, don't you? Baron and I do, and they say before those cameras were at every single hearing that when House is in session, Congress is at play; and when committees are in session, Congress is at work. Increasingly, as Brad said, committees are now becoming places where we're at play a lot of times, too, and I think cameras had a lot to do with that. So, I am really mixed.

**PROFESSOR GROVE:** We have just one minute, but let me ask whether there is any real disagreement among the members of our panel today that it's time for federal judges to be given a very substantial pay raise, leaving perhaps for later discussion exactly what substantial means, but substantial.

*(Laughter)*

I know, Mike, you've talked about the dangers of salary erosion for federal judges; and, Brad, is there something you would like to say about that?

**CONGRESSMAN ELLSWORTH:** Well, before I heard the professor speak—no, I'm kidding.

I'm probably the wrong one to ask. I have made a pledge not to take a congressional pay raise until we balance the budget. So, I will never take a congressional pay raise. If I can't prevent that, I'm going to donate it to charity.

That being said, what I feel shouldn't be inflicted on you. It should totally

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20. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003).

be separate. Your salary should not be tied to a member of Congress. My pension as a sheriff shouldn't be tied to the salary of the seated prosecutor of the State of Indiana, but it is. It's wrong. We need to look at that.

I know that Congress was working that last couple weeks. Mike and Baron, we figured it out one time, for about six dollars an hour for the hours we were putting in before we left for the August recess. So, we were a little underpaid for at least that time period.

But, no, I think it needs to be looked at. I know that there are questions, something that at least has to be discussed is the jurisdiction. I know that the cost of living in Los Angeles for a federal judge is different than that in Terre Haute, Indiana. So, that might be something to look at and how you figure that, but it is certainly an area to explore. Certainly we know what you put in, and we know that it would be time. The national times are tough in the U.S. government, as you know, with our debt and our budget, but I would certainly look at that.

**CONGRESSMAN HILL:** Well, I don't have the same convictions that Brad has on the salary issue for members of Congress. And I believe that we ought to have people in the judiciary that are compensated in meaningful ways.

But I don't agree with the separation. I think that—

**PROFESSOR GROVE:** Not decouple?

**CONGRESSMAN HILL:** I would not decouple. If you're going to get a pay raise, I want one, too. So, I would not be in favor of decoupling.

I do believe that members of the court do not want to become members of the court for reasons of salary. I think they want to become members of the court for a lot of different reasons; first and foremost is to serve their country. But because of that dedication, I think that we need to make sure that people who are making those kinds of decisions to serve ought to be compensated fairly.

**PROFESSOR GROVE:** I think time has run out for this component of the program.

**CONGRESSMAN PENCE:** May I address it?

**PROFESSOR GROVE:** Almost run out.

*(Laughter)*

**CONGRESSMAN ELLSWORTH:** He always gets the last word.

**CONGRESSMAN PENCE:** With the chairman's indulgence, I'd love to speak to that. I know we've talked about it, Jeff.

Scripture says a laborer is worth his wage.<sup>21</sup> I'm a very stingy conservative. I've led the stingy conservatives in the last Congress. But I think the time has come for us to make, not a pay raise, but a significant correction in the compensation of judges. The ways we pay federal judges today is what starting associates make on Manhattan Island.

Justice Breyer and Justice Alito came in and gave such an extraordinary presentation to the Judiciary Committee that day. What resonated with me the most was the notion that what should be the capstone of a career for financial reasons is increasingly becoming a stepping stone in career. I think that represents a very serious threat to the credibility, and I say this very gently, the

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21. See 1 Timothy 5:18.

integrity of the institution of the federal judiciary.

Where I would differ with Baron is I'm going to meet with Chairman Conyers next week, and I'm going to try and be helpful on this, which will require that it be offset with other spending cuts the administration seems to be prepared to endorse.

But I'm concerned, Baron, and I'm like you, I fear Mrs. Pence more than I fear voters.

*(Laughter)*

I've never missed a cost-of-living increase for Congress. But in this case, because we have such a large correction, that's necessary. Even if it is a temporary decoupling, we have to temporarily decouple to make a market correction.

I just think this is one of those moments where we need to recognize the long-term interest of an institution and attracting the kind of people that we want to attract at the end of distinguished careers, that would be the capstone of their career, that we need to find a way to be fiscally responsible to do this, and I look forward to working with many of you in Congress.

**PROFESSOR GROVE:** Well, I think on that note of presumed agreement between the congressmen over here and the federal judges in the audience, we should say thank you to our representatives who are here today. We really appreciate it. Thank you for your comments.

*(Standing ovation)*

*(A recess was taken.)*

**PROFESSOR GROVE:** To me falls the pleasure of introducing the Honorable Dan Coats who will provide a fitting introduction for Mr. Justice Alito and his keynote address, which is really, Justice, the keystone of our program today.

In introducing Dan Coats, I want to tick off a few accomplishments. It's kind of hard to know where to begin. There's a long list, I guess I would like to start by saying that Dan is a distinguished alumnus of our School. He's been a wonderful friend to the School for over thirty years. Just last week I came across a letter that he had written to me twenty years ago talking about a then-recent visit he had made to the Law School.

He was here just about a year ago talking about the confirmation process for Supreme Court Justices and recounting some of his experiences working as "the sherpa"—and that's Dan's term<sup>22</sup>—for Mr. Justice Alito and helping him navigate the shoals of the confirmation process. And he'll be here about a month from today talking about his experiences and insights he developed as the U.S. Ambassador to the Federal Republic of Germany.

In his public life, Dan Coats was a four-time congressman from Indiana, although he did not serve his fourth term. Senator Quayle was tapped by father George for the vice-presidential nomination. Dan was appointed his seat, two years later was elected in an interim election in his own right, was then elected

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22. See *All Things Considered: Samuel Alito Prepares for Confirmation Hearings* (NPR radio broadcast, Nov. 7, 2005).



to a full term in 1992, and after ten years of service in the Senate, he became ambassador to Germany.

So, just a final word of thanks to Dan for your instrumental role in bringing Justice Alito here today. I would be remiss if I didn't also mention the name of Judge Rugie Aldisert for whom I clerked back in the last century who is a friend of Justice Alito's and who also provided some encouragement for him to be with us here today.

So thanks to both Dan Coats and to Rugie Aldisert. And, Dan, thank you very much for coming here today.

*(Applause)*

#### INTRODUCTION OF JUSTICE ALITO

**AMBASSADOR COATS:** Professor Grove, thank you for—after your introduction of the members of Congress, I was a little nervous about what you might say, and you said all the positive things which I had forwarded to you by fax earlier.

*(Laughter)*

I just have to make a couple of comments. One, in case any of you were wondering, I didn't even make the honorable mention list of the most beautiful people in Congress.

*(Laughter)*

My hair follicles were in a race for me making that list, and my hair defoliation won.

I am pleased to be able to welcome Justice and Mrs. Alito here to Indiana. I think I probably speak—I know I speak—for everyone here in this room that we are very thankful and grateful that you have taken the opportunity to come to Indiana and to participate in this Conference on the relations between the Congress and the judiciary, a topic which both of you have had some experience, which I was privileged to be a part of. Having been through that process with you, I was a bit surprised that you were willing to come out and readdress that topic, but we're grateful that you're here.

I first met Judge Alito just very shortly after President Bush had nominated him to a position on the Supreme Court. And while then Judge Alito was highly respected by his peers in the legal profession, having received the highest rating that the American Bar Association Supreme Court Selection Committee can offer, he was not known to the general public and, in fact, to many of the senators who would be voting on his confirmation.

I quickly learned that this new nominee was a federal appellate court judge of fifteen years experience on the bench with hundreds of opinions and cases under his name. A former Assistant Solicitor General, U.S. Attorney, Deputy Assistant Attorney General in the Office of Legal Counsel, and a recognized constitutional scholar, this indeed looked like the right appointment.

A man who knew the law, he had a clear sense of the judiciary's role in relation to the other two branches of government. In this regard, then Judge Alito had stated, "Results-oriented jurisprudence is never justified because it is not our job to try to produce particular results. We are not policymakers, and we

shouldn't be implementing any sort of policy agenda or policy preferences, including invading the authority of the legislature."<sup>23</sup>

Suddenly this modest, humble, and private man was thrust into the intense spotlight of Washington politics. Every aspect of his public and private life was considered fair game for those who desperately did not want to see any nominee of President Bush confirmed to what many thought would be the fifth vote on the court, even though that did not turn out to be the case.

His every written opinion was scrutinized for ideological, political, and, even in some cases, possible religious bias. Political opposition groups called to get Alito and, therefore, get Bush. The intensity of that three-month-long confirmation process was greater than anything that I had witnessed in nearly two decades of public service. He was immediately given any number of labels, mostly unfair and certainly unflattering. But in his reply to the charge that he was an ideologue, the judge stated that, and I quote, "Such a person has a formula in mind in deciding cases. Facts are secondary to the result."<sup>24</sup> "That is not me,"<sup>25</sup> he said. "The judge's only obligation, and it's a solemn obligation, is to the rule of law."<sup>26</sup>

The media crush was equivalent to that of a rock star. Nearly blinded by the harsh lights of the cameras, Judge Alito stated to me that, "No one ever takes my picture, not even at family reunions."

*(Laughter)*

Those who watched the drama of the confirmation hearings witnessed the intensity of the three-day ordeal to which he was subjected, not to mention the three-month ordeal that preceded all of that. Through it all, Justice Alito never became defensive, never lost his temper, calmly answered each of his critics, and displayed a temperament and an even-handed fairness that silenced his critics.

I had the great privilege of sharing with Judge Alito that moment of relief and pure joy when the presiding officer of the Senate announced his confirmation. And I now have the great privilege of bringing to you and introducing to you not Judge Alito, but Supreme Court Justice Samuel Alito.

*(Standing ovation)*

(Justice Alito addressed the conference off the record.)

*(Standing ovation)*

**PROFESSOR GROVE:** On behalf of the Law School, Justice, I'd like to give you these small tokens of our appreciation for your being here. We are aware of your interest in Italian heritage, Italian cooking and cuisine, and I think these presents will reflect those interests. I'm not at liberty to say any more.

*(Laughter)*

But I hope you'll take these with you and open them at your leisure.

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23. *Hearing on the Nomination of Judge Samuel Alito to the U.S. Supreme Court Before the S. Judiciary Comm.*, 109th Cong. (2006) (response by Judge Samuel Alito to question by Sen. Charles Grassley, S. Judiciary Comm.).

24. *Id.*

25. *Id.*

26. *Id.* (Judge Alito's Opening Comments).

*(Applause)*

**JUSTICE ALITO:** Thank you very much.

**PROFESSOR GROVE:** It's time for lunch.

(A lunch recess was taken from 12:10 p.m. until 1:10 p.m.)

#### AFTERNOON SESSION

**MAGISTRATE JUDGE BAKER:** Good afternoon, everybody. My name is Tim Baker. I am a U.S. magistrate judge in the Southern District of Indiana. I also serve as chair of the Federal Judiciary Committee of the Indiana State Bar Association. It's my pleasure to welcome you all here today to the Conference, and I hope you're all having a good time.

*(Applause)*

I can assure you I am because not only have I enjoyed the Conference tremendously, but I even got to have lunch with my wife today.

*(Laughter and applause)*

So, that doesn't happen very often.

It is now my privilege to introduce our next speaker, Professor Charles Geyh, who is a professor at the IU School of Law in Bloomington. The way that Professor Geyh came to be involved in this program is as follows. When I started contacting people to let them know that we were putting together this Conference, the resounding response that I got was, "Is Professor Geyh going to be speaking?"

Several people asked me and almost insisted that I make sure that Professor Geyh was, in fact, on the panel. So I did a little research on Professor Geyh. If you've looked at his bio, you see that he certainly knows a thing or two about judicial independence, written more articles than I can count, appeared on talk shows, testified in Congress and has even written a book and that book is *When Courts and Congress Collide*,<sup>27</sup> which for \$29.95 is available from Amazon.com.

*(Laughter)*

So, you've heard the expression, "He wrote the book on it." Professor Geyh definitely wrote the book on it. Please join me in welcoming Professor Charles Geyh.

*(Applause)*

#### JUDICIAL INDEPENDENCE: DOES THE PUBLIC REALLY CARE?

Professor Charles G. Geyh  
Indiana University School of Law—Bloomington

**PROFESSOR GEYH:** Judge Baker, there is no way in hell I can live up to that introduction, and I'm not really going to try. Let me begin by thanking the state bar for pulling this program together. And thanks, too, to the Law School for hosting this extraordinary program and including me in it. I am humbled and

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27. CHARLES GARDNER GEYH, *WHEN COURTS AND CONGRESS COLLIDE* (2006).

deeply appreciative.

Today my topic is up there in black and white, “Judicial Independence: Does the Public Really Care?” What I want to do is really break this thing into two parts because there really are two questions embedded in the one. The one has to do with what is judicial independence, and the second has to do with does the public care.

As to the first, I think my goal is really to underscore the complexity of the subject a little bit and to unpack it some, and then to move on to the core of the talk which we’ll be dealing with: whether the public cares. And the answer, which is really quite true to form for a law professor is: The answer is yes and no, and yes, and no, and ultimately yes. But I’ll get there when I get there.

Starting with the business of what is judicial independence. I am guessing that of the judges in the group, all of you have been to one and probably multiple conferences on the subject of judicial independence, where an entire program is devoted to what is judicial independence or where you are handed little slips of paper and told, “Write down your definition of judicial independence.” To my way of thinking, the business of writing down a definition misses the point because ultimately what we’re stuck with is a very complicated concept that has multiple definitions, and understanding those multiple definitions is really important to understanding why the public response to judicial independence is as complicated and multifaceted as it is.

Now, this slide will do one of two things. It will either impress you with the crystalline complexity of judicial independence, or it will lead you to lose your will to live.

*(Laughter)*

Either way, it will serve my purpose of demonstrating that this is pretty complicated stuff. There’s a lot going on here, and let me unpack it a little bit for you.

In the beginning, we’ve got judicial independence up here. And it is, I think, fairly broken down at the most elemental level into two ideas. One is that we have complete independence; the other is that we have qualified independence. When we’re talking about complete independence, what I am talking about here is dictionary definitions, right? Independence means that you are basically free from any outside influence or control. If that is true, then judges aren’t independent at all, and you get people like Senator William Giles who was alive and kicking, almost literally, back during the Jefferson administration and was his generation’s answer to Tom DeLay saying, because judges, for example, can’t set their own budgets, can’t appoint themselves, are subject to removal through impeachment, that they aren’t independent. Similarly, you have Terry Peretti on the West Coast making the same point today.

They assume, I think, or what they’re talking about, is this notion of judges being absolutely independent and it’s not true and, therefore, judicial independence doesn’t exist.

The better way of looking at it, and the way people in this room look at it, is by recognizing it is instead a qualified concept. Judicial independence is qualified by the purposes it serves. Very few people would argue, I think, that judicial independence is an end in itself, that instead it is a means to other ends,

and you define it and circumscribe it with reference to those ends.

That being so, you can subdivide the qualified independence into its institutional and decisional dimensions. The idea being if what we're up to doing, saying there are limitations on judicial independence, it's got to serve purposes, and there are only two basic purposes that I think one can identify pretty easily. One is that independence serves the judiciary as a branch, that it preserves the integrity of judiciary against encroachments by the political branches, for example. Thus, one can talk about—and I think one frequently does hear Chief Justice Rehnquist—basically going to the stump and saying when judges aren't given salary increases on a regular basis or cost of living adjustments, it weakens the judiciary as a branch; it compromises their independence as an institution. One can make a similar claim about budgets, that when budgets are cut back too far, it impairs the judiciary's independence as an institution.

In those situations, unfortunately—you know, my topic is does the public care—when it comes to this one, it's a tough sell and you all know it, right?

There's a practical matter—Chief Justice Rehnquist gave his life to trying to sell this issue time and again, and it is very difficult to have the public think about this as an independence issue. And one can explore why that is right, that the judges aren't getting paid more than they are. So, they're unsympathetic and so on.

My point is that when we're talking about where the action is from the public's perception, it is with this other form of independence, decisional independence, which I think you can loosely define in terms of saying independence, you know, exists to enable judges to make decisions without threats or intimidation, all right? To make decisions in individual cases, that would be decisional independence.

When we're talking about decisional independence here, though, even that isn't really elemental enough, because we can further unpack decisional independence into component parts as well. Because when we're talking about worrying about judges making decisions free from the wrong kinds of influences, we're really talking about external threats and what might, for want of a better term, be thought of as internal threats. In other words, from an external standpoint, we are worried about outsiders being legislators, governors, presidents, or maybe even judges themselves interfering in untoward ways in the decisions of judges. Or we could also be talking about judges' independence essentially from themselves, their ability to follow the law and bracket out their own personal biases in an effort to actually follow the law.

To make this a little clearer, I think what you can say about relational independence—here I'm talking about the external variety, what I am saying is here—we're talking about whether judges are independent of these outside forces or in relation to these outside forces so that Article III judges get some relational independence from Congress by virtue of tenure and salary protections, all right? Conversely, they are not relationally independent as far as their budgets are concerned, to give you an example, all right?

In contradistinction of that, behavioral independence sometimes travels hand in hand with relational independence. If judges are made beholden to the

legislature, then one can fairly assume that their behavior when they make decisions is going to be to kowtow to the legislature; that can be the operating assumption. Conversely, the argument can go that if judges are relationally independent, in other words, if they get their independence from the political branches and the public, they will be liberated to follow the law and they will do so. But that isn't necessarily so. In other words, what we see in some instances is judges who are relationally dependent. Judges in Eastern European countries who are under the thumb of others may nonetheless be heroic and make decisions that are behaviorally independent, that follow the law, notwithstanding the fact that they're at risk of getting fired when they make those decisions.

Similarly, you can see judges, for example, in the former Soviet Union who have now left the control of, say, the parliament or of the president, but who are so accustomed to the business of basically being beholden to others that, you know, they continue to make decisions that are behaviorally dependent on someone else, even though they don't have to. So we have each of those as sort of distinct phenomena.

We also—and in some ways this is a prelude to the more important point. When we're talking about behavioral independence, the business of whether judges actually follow the law and actually disregard the pressures that are out there, we are also, in a very important way, talking about the ability of judges to resist their own passions, to separate themselves out from their own backgrounds, their own politics, their own political predilections, and apply the law.

So, we've got these two separate ideas, both of which I think are in play. Now, if we sort of bear down on each of them in turn—let's look at relational independence a little bit more closely. Where does it come from?

In the federal system, I think it's understood that federal judges have a lot of independence. They really do. Some of it comes from Article III, as I said before. That's what I would characterize as doctrinal independence, right? By which I mean, if some Congress gets the bright idea of cutting judicial salaries, it's not going to stand. Why? Because they're going to go to court, have it declared unconstitutional as contrary to Article III. Constitutional doctrine says you've got that kind of independence.

But, we also have other kinds of independence that are less thought about. When it comes to, for example, functional independence, there are circumstances in which judges have certain freedoms that exist simply because Congress hasn't bothered to act. During the nineteenth century, to give you an example, there were district judges spreading across the western United States like crazy. There were so many of them, the Supreme Court rarely heard arguments from their cases. There just were too many of them, and as a consequence, they were functionally free to basically do what they damn well pleased, knowing that they weren't ever going to get reversed. The business of interposing a court of appeals structure came at the end of the nineteenth century; it ended their functional independence to basically do what they wanted and subjected them to a level of control from fellow judges. Was it a threat to their independence? No. Was it something that was contrary to the Constitution? No. It was just something that finally Congress got around to doing it after thinking about it for half a century, all right?

Finally, the third form of—really again subpart of—relational independence is—we’ve just talked about—independence that comes direct from the Constitution. We’ve talked about independence that comes basically by accident, and then we talk about what I think is, and it really is the focus of my book, the far more important form of independence. If you think about it, if Congress wanted to drive the federal judiciary to its knees, it could do it tomorrow. It could impeach them for making bad decisions. It could impeach them for having bad hair. And we’re already told that these are political questions that the Supreme Court isn’t going to involve itself with, so Congress is free to do that.

Congress, I think in my estimation, could strip the lower courts of all kinds of jurisdiction. It could disestablish all kinds of courts. It could slash all kinds of budgets, and there wouldn’t be much that the federal courts could do about it. That doesn’t happen. It’s not necessarily because it’s unconstitutional. It’s not simply a matter of, well, they just haven’t gotten around to it because, Lord knows, they’ve tried. It’s because there is a custom of independence that has evolved over the course of 200 years where we say we have certain judicial independence and norms that say this isn’t the way we do business here.

So, for example, when it comes to impeaching judges for bad decisions, they tried that early on, they’ve abandoned it early on, and it has literally never happened. So, I think for that reason you can sort of see these as three different variations on the judicial independence theme for when it comes to controlling relational independence.

When we’re looking instead at behavioral independence, the question of whether, on a micro-level, judges are actually following the law thanks to their independence, we have three different ways of looking at the world there, too. One is the legal model, and I don’t need to dwell on it because I’m surrounded by lawyers here. But the notion is if judges are given relational independence, if they’re given protections like life tenure, like a salary that can’t be cut, they will follow the law. They take an oath to do so; they will honor that oath.

On the other hand, the political scientists of the world, not all of them but a good chunk of them, adhere to what is referred to as the attitudinal model of judicial decision-making. When judges are given independence, they argue, the data they have generated suggests judges disregard the law. They follow their own political predilections. They are, in other words, not behaviorally independent at all. They don’t follow the law. They follow their own values. They follow their own politics. And so independence relationally doesn’t generate, doesn’t translate, into behaviorally independent judges who respect and follow the law.

The third group in that pack dealing with the neo-institutional model, they basically split the difference and say judges are complicated people. In some ways I’m sympathetic to this category, by the way. We’re past the point when the legal realists hit town in the 1920s, it’s too late in the day to say law is all there is to do with what judges do. Law is part of it. Background is part of it. Ideology is part of it. Philosophy is part of it. The institutional setting that you find yourself in is part of it. So, all of these complicated factors contribute to the kinds of decisions judges make. So, from that vantage point, when judges are confronted with questions, yes, they are independent in part, but they are also in

some ways influenced by these other considerations.

Now, I appreciate the fact that, thus far, no one has sort of pitched face forward on their desk, because this is the dull part. I'm now getting into the stuff that I find intrinsically more interesting, which is, okay, these are our various definitions of judicial independence, does the public give a damn?

Here I've got five basic points. And I kind of like them. Total accident obviously, but I've got this nice little pyramid effect going on here with the way the script worked out.

At the most elemental level is what I would characterize as the platitude. Before I get going, I want to both offer thanks and an apology to Chief Justice Randy Shepard at this point because last year he hosted an excellent conference on the centennial of Roscoe Pound's address to the ABA [American Bar Association], where I did give a talk, and where I am now sort of retreading what I did in part there. The thanks are obvious for hosting that program; the apology is he's enduring it the second time, and I'm sorry about that.

But bringing it down to the level of platitude, at the most elemental level, I think what we're seeing here is that judicial independence is rather like lollipops, rainbows, and free checking. What's not to like about it? And you see statements, you know, Chief Justice Rehnquist referred to it as the "crown jewel." Ralph Mecham referred to it as the "cornerstone." My favorite was ABA President A.P. Carlton who said, "Judicial independence is precious to our way of life. Judicial independence is a fundamental principle on which our country was founded and for which Americans have died, not only at Yorktown and Valley Forge, but the Alamo, Iwo Jima, Inchon, Khe Sanh, and, now, Mezar-E-Sharif."<sup>28</sup> I mean, good Lord, who could be opposed to that, right?

*(Laughter)*

Now, the problem is that, if we come back to the chart, this is really operating at this level and really at the notion that judicial independence is just at the level, at its most basic level is a great thing.

Now, one needs to be careful even here because within the public the term independence doesn't resonate well all of the time. That's, I think, because they interpret it in terms of the complete definition, that it means judges are utterly unaccountable. We don't want unaccountable judges; hence, maybe as a platitude we're not even sure about that. So, for that reason, people who are doing communications work for judges are saying your better bet is to talk in terms of fair courts, not independent ones, fair judges, impartial judges, strong judges, all of which plays well to the public and which underscores that ultimately, at least at the platitude level, yes, the public is with you. They're okay with it. They like judicial independence at least defined in that way.

Below that is the level of what I would characterize as naked self-interest. At the micro level this is easy to understand. If you are a litigant, right, you don't want an independent judge. You don't want an impartial judge. You want a judge who will give you a win, right? It's as simple as that. Who doesn't?

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28. Alfred P. Carlton, Jr., *Preserving Judicial Independence—An Exegesis*, 29 *FORDHAM URB. L.J.* 835, 837 (2002) (internal footnotes omitted).



So at a micro level that is clearly, I think, the case. If you're litigating, you want to win. You know, maybe if you're a lawyer you'll say, "Well, I would rather lose than lose an independent judiciary." Yeah, but your client might think otherwise.

*(Laughter)*

And I think that similarly at a macro level—at a macro level—the political majority will be saying that we, the majority, think this is really important. We don't want you getting in the way. We want to win. We don't want your independence, we want your obedience.

So in one of the finer quotes by a governor in recent memory is California Governor Gray Davis who was quoted as saying, "All my appointees, including judges, have to more or less, reflect the views I've expressed in my election, otherwise, democracy doesn't work."<sup>29</sup>

*(Laughter)*

"They are not there to be independent agents. They are there to reflect the sentiments that I expressed during the campaign."<sup>30</sup> Then, of course, within twenty-four hours he says, "This doesn't mean I don't support their independence 100%."<sup>31</sup> You know, fine.

I mean, very quickly after there was sort of like a Soup Nazi event that happened. No governing for you, Gray Davis. And so he was out of office.

*(Laughter)*

But the point here is, though, I think this sentiment is likewise reflected in some polling data. And from this point forward in my talk, I am going to talk a little bit about polling data, because the polling data is all over the map. On some level you can basically say, "Stupid public, they don't understand what's going on." There may be some truth to that but I think there's also some truth to saying that the reason the public is all over the map is because they really are thinking about judicial independence in different ways.

At this level, getting back to the chart, we're talking about really what amounts to independence at the basic decisional level here. What they're saying is, "I'm not sure I like it if it means I could lose." That's a perfectly natural response at really the naked self-interest level.

When it comes to polling data, we do have 56% of the public surveyed in a poll conducted in 2005 who reported their agreement with the proposition that court opinions should be in line with voter values and that judges who repeatedly ignored those values should be impeached. If you don't go along with us regularly, out you go. Why? Because we want winners. We want to win.

Now, below this level of naked self-interest is a level that I have called enlightened self-interest, which says in a perfect world I'd win every time. But

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29. William G. Paul, Op-ed., *Keep the Judiciary Independent*, CAL. BAR. J., April 2000, available at <http://calbar.ca.gov/calbar>.

30. *Davis Wants His Judges to Stay in Line: He Says They Should Quit if Views Change*, S.F. CHRON., Mar. 1, 2000, at A3.

31. See Editorial, *A Judge's Proper Role Is Independent Agent*, S.F. CHRON., Mar. 3, 2000, at A24.

I am not dumb. I know that my opponent feels likewise, and I also know that I may not be able to control the outcome every time. As an individual, he may have more influence. As the political majority, I may be out on my ear tomorrow. And that fallback position: If I can't win every time, the better bet may be for us to have a neutral, an intermediary, someone who is immune from both of us and can give each of us a fair shake. So, in the spirit of enlightened self-interest, the idea is we're all for judicial independence.

Here, I mean I think it's simply understanding that litigation is a zero-sum game, and if I can't control the outcome and my opponent can, I'm worse off than if neither of us can control it and we consign it to a neutral. Here is where you get the dreaded sports metaphor in abundance, right? Here is where judges are umpires, judges are referees, and you don't screw around with the referee. Because enlightened self-interest says, yes, you'd like your team to win, but the moment you get to influence the referee is the moment they get to influence the referee, and then where will we be?

So we end up seeing people like Senator James Jeffords saying, "The first lesson we teach our children when they enter competitive sports is to respect the referee, even if we think he might have made the wrong call. If our children can understand this, why can't our political leaders? We shouldn't be throwing rhetorical hand grenades."<sup>32</sup>

So in the spirit of enlightened self-interest, give it over to the referee. Back off from the referee. We, the public, like independence. And indeed, 73% of the public surveyed reported their agreement with the statement that judges should be shielded from outside pressure and allowed to make their decisions based on their own independent reading of the law.

Now, bear in mind that this is not entirely consistent with saying 56% also agree judges should be thrown out on their fannies if they make decisions contrary to the public's values. There's a tension there. But I think that what we're dealing with here is we're working our way down the chart and looking at the need for relational independence here and saying that on the whole relational independence is very important to preserving the rule of law and to basically making sure that there's a level playing field. So, even though there is that sort of tension in the polling data, I think what it comes down to is that they're looking at judicial independence in slightly different ways.

Similarly, 83% in a different survey felt that judges should be protected from "political interference" by Congress. Again, consistent with this notion of enlightened self-interest.

Now, beneath the enlightened self-interest layer is a fourth layer, which I have called skepticism of judicial motives. An assumption underlying enlightened self-interest is that judges insulated from outside pressure will follow the law. In other words, that referees will do what they're supposed to do, which is play it by the book, follow the book, not create the book. And nowhere is that better expressed, I think, than by Chief Justice Roberts during his confirmation

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32. Carl Hulse & David D. Kirkpatrick, *DeLay Says Federal Judiciary Has "Run Amok," Adding Congress Is Partly to Blame*, N.Y. TIMES, Apr. 8, 2005, at 21.

proceedings with yet another sports metaphor. “Judges are like umpires,” he said.<sup>33</sup> “Umpires don’t make the rules, they apply them.”<sup>34</sup>

Beneath this layer, however, of enlightened self-interest, is a deep-seeded skepticism among some that judges don’t do that, that judges are, in fact, out there making stuff up as they go. As one editorial writer put it in responding to Senator Jeffords whom I quoted before, “Sen. James M. Jeffords . . . wants us to respect judges just as ‘we respect the referee’ in competitive sports . . . [b]ut fans would never tolerate a baseball umpire changing the rules of the game by calling a batter out after two strikes.”<sup>35</sup>

So, from this vantage point, right, we’re moving toward behavioral independence and we’re adopting what amounts to an attitudinal model. We’re saying, “Judges, you get all this relational independence, you get all this life tenure, you get all of this salary that can’t be cut, and what do you do? You abuse it. You aren’t behaviorally independent; you’re doing what you damn well please. We don’t like it.” So, therefore, we are in some ways deeply hostile to the notion of judges getting too much independence if that’s what they’re going to do.

So we end up seeing, again in polling data, some support for this proposition, that “56% of those surveyed”—again, this 56% figure comes up again and again—“share the view that judicial activism seems to have reached a crisis.” They agreed with that statement, because “judges routinely overrule the will of the people, invent new rights, and ignore traditional morality.”<sup>36</sup>

In another survey, totally different the next year, again 56% of respondents said they agreed with the statement that, “Judges always say their decisions are based on the law and the Constitution, but in many cases judges are really basing their decision on their own personal beliefs.”<sup>37</sup>

Then, finally, you’ve got a survey in 2003 which found that 76% agreed with the statement that political, as a term, described judges well or very well. So, what we’re seeing here, I think, is that there is this deep-seeded skepticism in some quarters. And, by the way, there’s nothing novel about this.

In my book<sup>38</sup> I walk through sort of the historical argument and say every time we have a transition in political power, a realignment, we see something like this happening. Out goes the old boss; in comes the new. The old boss has appointed the previous judges who stay on. They cheese off the new guard, and you end up seeing threats ensue, and you end up seeing the new guard saying,

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33. Charles Babington & Jo Becker, *Judges Are Not Politicians, Roberts Says*, WASH. POST, Sept. 13, 2005, at A1.

34. *Id.*

35. Phyllis Schlafly, Editorial, *Liberals Rally Around Judicial Supremacy*, INTELLIGENCER (Doylestown, Pa.), Apr. 27, 2005, at 15A.

36. Martha Neil, *Half of U.S. Sees “Judicial Activism Crisis,”* A.B.A. J., Sept. 30, 2005.

37. CAMPBELL PUB. AFFAIRS INST., MAXWELL SCH. OF SYRACUSE UNIV., JUDGES AND THE AMERICAN PUBLIC’S VIEW OF THEM: RESULTS OF THE MAXWELL POLL 3 (2005), <http://www.maxwell.syr.edu/news/MaxwellPoll.pdf>.

38. GEYH, *supra* note 27.

“We don’t trust you guys because you’re not following the law as we understand it.”

So, in the first generation of our nation’s history, out go the Federalists for the first time, in come the Jeffersonian Republicans along with Senator Giles, and they start trying to impeach these guys, disestablish their courts because they don’t like what they’re doing. A generation later, Andrew Jackson is out there saying, “Justice Marshall, I can’t stand the sight of you. And my populist views of the way government should run are really in tension with this life tenure judiciary stuff, and we don’t like the idea that you are dragging us down.”

A generation later you’ve got the Republicans taking control of Congress during and after the Civil War. They’re looking at the Democrats that decided *Dred Scott*<sup>39</sup> and saying, “Not again, buddy. We are going to strip you of jurisdiction, we’re going to,” one congressman said, “annihilate you if you get in our way.”

Next generation and the populists and progressives are coming into power. They don’t like the conservatives that are doing things like the *Lochner* case.<sup>40</sup> And they’re saying, “Let’s create judicial recall, let’s end life tenure, let’s do all kinds of things.”

Next generation it’s Franklin Roosevelt and the New Dealers who are fighting with the holdover conservatives who are getting in the way of his New Deal agenda. The generation after that it’s the Warren Court, and then we get to our current regime. So, none of this, in that sense, is all too terribly new because in each case we’re looking at the new people in power who are saying, “We don’t particularly like what we have been seeing; throw the bums out.”

Now, that gets us to the final stage that I want to talk about here, which is a judicial independence tradition. The reason I went through my little dog and pony show with five or six different cycles of judicial attacks through history is to say, yes, we’ve had these cycles but my point is—and again, this is something that I spend a lot of time with in the book<sup>41</sup>—that with each passing cycle, the success of efforts to squash the judiciary flat have failed more and more frequently.

So in the first generations, they managed to disestablish courts. They managed to defy court opinions. They managed to strip courts of jurisdiction. Beginning with the twentieth century, however, they got out there with a lot of sound and fury, and it basically signified sound and fury. By the time the twentieth century rolled around, cooler heads were beginning to prevail, and the argument was, look, we tried impeachment, bad idea; we tried disestablishment, bad idea; we tried court stripping, bad idea. You’re going to keep trying it, but it’s antithetical to what we think of as judicial independence—not because the Constitution necessarily demands it, but because we have these independence norms.

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39. *Dred Scott v. Sandford*, 60 U.S. 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV, § 1.

40. *Lochner v. New York*, 198 U.S. 45 (1905).

41. GEYH, *supra* note 27.

Coming back to where I was before, it really comes down to the customary independence point. We have this tradition, we don't treat judges this way. Some of us want to every time they make decisions we don't like, but at bottom, at core, there is this deep-seeded tradition of respecting the judiciary's autonomy at an elemental level. In some ways, I would argue that these periodic threats are healthy, because it's those periodic threats that galvanize the forces that say, "No, no, no, this isn't how we do things in America. This isn't how we work." We get out there, and we fight back the efforts to jurisdiction strip. We fight back the efforts to make judges fill out time sheets on a daily basis. We fight back on efforts to do things like create a solicitor general or an auditor general for the federal judiciary. These are the kinds of things that we look at and say, "Let's think about this with reference to our traditions and whether we're prepared to change our traditions in a fundamental way."

So, for that reason, what I would argue is those of us who are concerned about the independence of the judiciary ought to be concerned, both at the federal and the state level, about preserving these fundamental norms that keep the judiciary more or less in place despite these rather frightening things happening. And I think, just to shore this up, the public likewise goes along with this notion. I think, despite the data that I have presented before, there is other data that really suggests that the public is with us on this one.

Seventy-six percent of the public expresses some or a great deal of confidence in the United States Supreme Court, followed by 74% that expresses some or a great deal of confidence in the federal courts, and 71% for state courts. Pretty high numbers.

Seventy-nine percent of the public thinks that "dedicated to facts and law" describes judges well or very well, while 75% say the same thing of "fair" and 63%, not high enough but still well over a majority, think the same thing of "impartial."<sup>42</sup> So, at its core we do have this baseline of support for judges. We vacillate back and forth along the way, but when the chips are down, we don't want to threaten them unnecessarily. Yes, there may be some activists out there, but the solution isn't to throw the baby out with the bathwater. Ultimately, we have confidence.

Now, I will say that these confidence numbers are a couple of years old, and I haven't looked closely at the more recent figures, but they're a lot lower. The confidence levels have dropped significantly for judges in the last year. The reason I'm not pushing any panic buttons on that is because when you look at the confidence numbers in the President and in Congress, they're down in the twenties. I think it's probably fair to speculate that the confidence level applicable to the courts has less to do with anything the courts have done than with a generalized suspicion and disenchantment with government generally that may bleed over into lower numbers for judges. The fact remains that the numbers for judges are still considerably higher than they are for either of the other branches. For that reason I think there's some cause for saying that at this

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42. JUSTICE AT STATE CAMPAIGN, NATIONAL SURVEY OF AMERICAN VOTERS 5 (2001), available at <http://www.faircourts.org/JASNationalSurveyResults.pdf>.

core we still have this basic level of confidence.

With that I will subside. I've got a few minutes where I am delighted to take some questions and sort of filibuster my way until 2:00.

(Applause)

**PROFESSOR KARLSON:** I loved what you had to say, but this is a question I wished to ask earlier but I did not have an opportunity. That is to what extent is this perception of the public being generated by the fact that the Court recently itself has not shown great deference to its own precedent? I will just use as one example—it's not because I disagree with the result, but the process is very important. *Lawrence v. Texas*<sup>43</sup> not only reversed a relatively recent United States Supreme Court opinion on the exact same topic, but ridiculed in the strongest of language some of the authors of the earlier opinion.

When the Court does that to itself, isn't it an indication that the public might have a reason to lose trust in itself when it evidently has lost trust in itself as well?

**PROFESSOR GEYH:** I think the larger problem that you're pointing to is that when the public thinks about judges and courts, what they see and what they think about are the Supreme Court, that they see the Supreme Court as really emblematic of what judges do. And the political science data, although I am critical of it, is almost universally focused at Supreme Courts, and it is there where the court is a most political animal. I don't necessarily mean partisan political; I mean where the textual weave of the law is so open that conservatives and liberals can look at it in different ways, and that is where I think your point is, that there are internal controls that the system has to try to trim back on that which is precedent.

The problem is that at some point along the way, arguably the boat got rocked. And once it rocked one way, the other side wants to rock it the other, and restoring a state of equilibrium is complicated.

And I think that, yes, the Court declining to adhere to its own precedent does contribute to the level of skepticism that judges are not to be trusted because they're simply political animals. It is exacerbated by the press which reports decisions not with reference to the reasoning of the judges, but with reference to the political alignment of the judges who made the decision. It is exacerbated by the fact that the routine decision of the judges, the unanimous opinion of the Court where the conservatives and liberals converge and say, "This is clearly the case," doesn't get much press attention. What's interesting about that?

But that's where you can make the case for saying that law matters, that these people are independent, judges do follow the law. Lord knows, and probably many of you are pleased with this, at the trial level the press isn't covering you every day. You may be happy with that. But I think that if the press understood and if the public understood that the average case is pretty dull because you're doing it by the book, that would contribute to a more rounded perspective on what it is that judges do.

Yes.

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43. 539 U.S. 558 (2003).

**UNIDENTIFIED SPEAKER:** In terms of this point you were just making, in terms of public perception, do you think that when—a million and a half cases filed in Indiana courts each year, so lots of people in this State go into a trial courtroom year in and year out. When they see Judge Moberly, is their perception of her the same as their perceptions of the members of the United States Supreme Court?

**PROFESSOR GEYH:** Terrific question. The data suggests that when the public have this first contact, it is an enormously important one; and that, yes, when they have contact as witnesses, as litigants, as jurors, it is a terrific opportunity to introduce them to the judicial system in a way that leaves them thinking very favorably about it or unfavorably. And indeed, I think when you look at polling data—I'm giving you general data but it is highly misleading in the sense that there is a racial divide that is stark in which communities of color the levels of skepticism of judges and the judiciary is much, much higher, and I don't think that's because of their view of Supreme Court decisions. I think it's because of their view of who is being dragged into trial courts and how people in their courts are being treated in some instances.

So I guess my point would be that, yeah, to the extent that you take advantage—and most courts do, I think—by the way, I think most of the judges I'm talking to here have programs in place that are really designed to educate jurors. You show films. You have people coming and talking to them. You take advantage of that. That's a terrific thing, and I think that can have a very positive impact on the way things are going.

I think with the racial divide, it's also a sign that something else is going on here that we ought to worry about.

**UNIDENTIFIED SPEAKER:** Just to follow up, wouldn't it be better if the people in our State could see Judge Moberly on television rather than Judge Judy?

**PROFESSOR GEYH:** Boy, is that a rhetorical question. Yeah, and I don't know what—when it comes to cameras in the courtroom, my sense is that there is less of an issue on the appellate level than there is on the trial level because of concerns for privacy of witnesses and jurors and so on. But I would agree with you completely in the sense that were the public able to see—

**UNIDENTIFIED SPEAKER:** I'm just asking a question.

**PROFESSOR GEYH:** Yeah, abstract. I think that there is some understandable concern about it. There's also a sense that you can lose control of your proceeding. You know, witness the O.J. Simpson case. Although there I think one can fairly say the judge was special in that case, and it wasn't necessarily that every judge in a similar situation would have lost control of the case the way that one was lost.

But, short answer, yes, I do think when the public sees proceedings, they walk away with a more favorable impression almost inevitably. The more you can expose them to this, the better. The trouble with this is that when they film a trial proceeding, invariably the fifteen-second snippet that makes air time is the one where something screws up and goes badly, and that's the thing that you see. But if you could sit down and see half an hour of a court proceeding, I think that would make an important contribution.

Yes, Judge Barker.

**JUDGE BARKER:** Don't you think some of the bad rap that gets laid at the feet of judges in particular and the courts and the judiciary arises from the cases that come through, some of which result in an outrageous outcome, outrageous by popular public sentiment? The too-hot coffee that generates hundreds of thousands of dollars in damages, that sort of thing.

So there's not a lot of distinguishing going on by the public with respect to whose responsibility it really is and all of that, it's just, "Oh, my gosh, did you hear what happened in our courts today?"

**PROFESSOR GEYH:** Yes, and I think that there are a couple of things going on there. I think that one can make the case for saying that in some instances perhaps we're not making adequate use of Rule 11.<sup>44</sup> But I think in some cases one can also say that a little knowledge is a dangerous thing. So, that, for example, in the case of the McDonald's case, it really was all about you spilled coffee on your lap and you're getting lots of money.<sup>45</sup> That's an outrage.

You can still argue that it was a badly decided case. When you recognize that when you get a cup of coffee and you spill it, you expect to get a little bit scalded, but the idea of getting third-degree burns because they serve the coffee at the boiling point is something that one can fairly say, well, yeah, that's a little different. But that never made the press really.

So, I guess my point is that by summarizing trial court decisions in that way, you wind up in a situation where you can end up communicating—you're communicating a political point of view rather than reporting on the decision and, of course, the public will interpret it badly.

The flip side of this—and I know that because you're at trial level it's less applicable to you—but the other problem certainly at the state level, and I think at the federal level as well, is that we've gotten to the point now where when it comes to appellate courts, they serve two purposes. One is to essentially correct errors, and the other is to tell us what the law is.

The courts of appeals have basically become the final stop in the process of figuring out who the winner is and who the loser is. And the Supreme Court is basically not taking routine cases, simply correcting errors. They are picking or limiting their selection of cases to those in which there is an open question, a very important and open question. So, inevitably these are the cases that are the political hot buttons. They're the ones where the Court seems to be following the law least because they are the most policy-laden questions.

The easy cases where one would get the impression that you're simply following the law are the ones that the Court doesn't decide. They're the ones, let's leave that to the appellate courts. And conversely, the appellate courts are now stuck as the court of last resort in almost all cases, so they become a political hot button, too, and they're now under pressure.

So it is a very complicated phenomenon that we're witnessing here.  
Any final questions?

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44. FED. R. CIV. P. 11.

45. *Liebeck v. McDonald's Rests., P.T.S., Inc.*, 1995 WL 360309 (D.N.M. 1994).



I appreciate your indulgence. Thank you.

*(Applause)*

**MAGISTRATE JUDGE BAKER:** Thank you, Professor Geyh. Thought provoking indeed. I never thought that a judge could be impeached for having a bad hair day, but I guess that's a possibility.

We're going to take a short break now, and we're going to come back with our final panel, our panel of judges, who I suspect have a thing or two to say. So, if you come back here at 2:15 p.m., we're going to hear about that. Thank you.

*(A recess was taken.)*

#### VIEW FROM THE COURTHOUSE PANEL DISCUSSION

Panelists: The Honorable Larry J. McKinney, The Honorable Robert L. Miller, Jr., The Honorable Sarah Evans Barker, and The Honorable Randall T. Shepard

**MAGISTRATE JUDGE BAKER:** Good afternoon, everybody. It is my pleasure to moderate the final panel of the Conference, which will address "The View from the Courthouse." As you can see, we are privileged to have a very distinguished panel which I would very briefly like to introduce. I think most of you should be familiar with our panelists.

To my far left is Chief Judge McKinney, who has served as Chief of the Southern District of Indiana since January of 2001. He has served as district judge in the Southern District of Indiana since 1987. Prior to his service as a district judge, he was elected to be the judge of the Johnson Circuit Court in Johnson County in 1984 and in 1978.

To Judge McKinney's immediate right is Judge Barker. Judge Barker has served as a district judge in the Southern District of Indiana since 1984. She served as Chief Judge of the Southern District between 1994 and 2001.

She currently serves as President of the Federal Judges Association, a high distinction because that association is an association of Article III judges devoted to protecting the independence of the federal branch.

In addition—one additional item for Judge Barker—in 2004, former Chief Justice Rehnquist named her to a commission chaired by Justice Breyer to investigate the misconduct allegations against judges and to address that issue. So, based upon her presidency of the Federal Judges Association and that experience, she is uniquely qualified to do that today.

To my far right is Judge Miller, who is serving as Chief Judge of the Northern District of Indiana and has been in that position since 2003. He has been a district judge in the Northern District of Indiana since 1986. Prior to his service as a federal judge, he was the Superior Court Judge in St. Joseph County.

To my immediate right is an individual who you may recognize, Chief Justice Randall Shepard. Justice Shepard has been the Chief Justice of the Indiana Supreme Court since 1987. Prior to that he was an associate justice on that court. Prior to being appointed to the Indiana Supreme Court, he served as a judge in the Vanderburgh Superior Court.

In 2006, Chief Justice John Roberts appointed Justice Shepard to serve on

the Judicial Conference Advisory Committee of the Civil Rules of Procedure. So, the federal folks have already been tapping him for his expertise, and I am happy to do so today.

Although the focus of our topic today is on the federal courts and the way that federal courts relate to Congress, Justice Shepard is in a unique position to offer his views both on that topic and on some of the judicial independence topics as they relate to the state court judges.

One additional comment with respect to Justice Shepard. I know he's not feeling particularly good today, and he has been a good sport to stick with us throughout today.

Will you please join me in welcoming our distinguished panel.

*(Applause)*

Thank you. With all due respect to Professor Grove, that's a pretty good looking panel right here.

*(Laughter)*

Strained relationships between Congress and the federal courts are nothing new, but many have questioned whether those relationships today are worse than they ever have been. In fact, former Seventh Circuit Chief Judge Joel Flaum commented in 2006, "In my 32 years as judge, I have never seen relations between the judiciary and Congress more strained."<sup>46</sup> So, that's going to be the first question for our panel.

I think Judge Barker had a few things she might want to say today, so, Judge Barker, would you agree with Judge Flaum with respect to the way relations are today?

**JUDGE BARKER:** Well, of course, I always agree with the court of appeals.

*(Laughter)*

**MAGISTRATE JUDGE BAKER:** Unfortunately, they don't always agree with you.

*(Laughter)*

**JUDGE BARKER:** There's payback for that, Tim.

*(Laughter)*

It's the life we live—who agrees with us and who doesn't, and it's all up and down the line in the judiciary, and it's all across the map with the public.

I think that the atmospherics of our relationship sort of ebb and flow. I think they're better today than they were two years ago. I don't know why exactly. I know I would attribute it, in candor, to the change in leadership in the Congress; the former chairman of the House Judiciary Committee had a particular dislike for judges about which he spoke often. And the current chair doesn't have that antipathy towards the federal judiciary.

I think sometimes the pace of our lives and the expansive reach of government make people impatient, so they don't like it. You remember even when your children were small, mine now are grown but when they were small, a small child will ask their parent, "Who's your boss? Who's your boss?" We

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46. Pamela A. MacLean, *Judges Warned About Seminars*, NAT'L J., May 29, 2006, at 5.

don't like bosses. That's a very strong, individual characteristic among Americans.

We are individualistic and we don't like people telling us what to do, and that's what courts do. We have to tell people what to do. We try to issue orders that are self-enforcing so we don't have to send the marshal out with every one of them, but it doesn't always pan out that way. We have to sometimes go to the mat on some of these things.

So, there are strong negatives towards government generally, and they focus on the judiciary. And Congress receives that message because, as you heard in our panel discussion this morning, Congress has its ear to the voice of the public. So, they have to show they're responsive to that, they hear it, and they are looking for some way to alleviate whatever the irritations may be at any particular moment.

It is true that we're insulated by our jobs from a lot of the consequences that Congress has to contend with. We don't travel back and forth to D.C. We don't have to have two homes. We don't have to run for office. We don't have to work at keeping the public satisfied in a way that shows up at the ballot box and so forth, and I think there are resentments between Congress and the courts on that.

I made some decision—I know it was one of my best—but it generated a little bit of controversy. A woman called in—this happened not too long ago—and she was very negative on the decision, very critical of the decision. And I didn't talk to her, but she talked to my administrative assistant, and she ended her spiel about how bone-headed a decision it was, how stupid, how un-American, etc., saying, "You tell Judge Barker I will never vote for her again."

*(Laughter)*

So people are looking for a way to punch at the judiciary and the decision-makers, and we don't give them very many ways to do that. But we have to have that insulation in order to do the work that's entrusted to us.

**MAGISTRATE JUDGE BAKER:** Thank you.

Judge McKinney, what do you think about the current state of those relations?

**CHIEF JUDGE MCKINNEY:** I just wanted to mention that I talked with that woman that talked to you, and I did such an excellent job she'll be looking for your name on the ballot the next time.

*(Laughter)*

But it's interesting, the whole notion here is interesting about judicial independence and how we get along with the Congress, and I don't think about it very often. I think one of our responsibilities as judges is, first, before we think about what our relationship is with Congress and whether it's been as bad as it's been in the last thirty-two years, to make sure that we're doing what we're supposed to be doing. As we sit there every day resolving disputes in such a way that the dispute is actually closed, in that closure we want the respect of both parties, the plaintiffs and the defendants, and we want them to leave the court with the notion that they have been heard and that the dispute has been resolved in a respectful way.

When we do that, we do that for a while because those before us have done

that, then perhaps we can talk a little bit about judicial independence. But I don't know whether things are worse between us and Congress. I listened to the three congresspersons this morning, I think in Indiana we're awfully fortunate to have congresspersons who are actually paying attention to this subject. Both of our senators, who couldn't be with us, are awfully aware of concerns; and we don't get the kind of hostility from our own representatives both in the House and the Senate that others might have.

I don't see the situation the same. I think maybe if you're on the appellate court you see it a little differently and certainly if you're on the Supreme Court, you would be a little more sensitive to relationships. And maybe the elephant in the room is the George Bush decision that Congress has never forgiven them for, I don't know.

**MAGISTRATE JUDGE BAKER:** Thank you.

Judge Miller, how about up in the Northern District, what's the feeling there and your sense of relations?

**CHIEF JUDGE MILLER:** Well, first of all, I get phone calls like that, too, but they're always commending my decisions.

*(Laughter)*

The crackpots come out in favor.

I think you have to be careful. I think those of us who can look back over thirty-two years tend to think things aren't as good as they were in the good old days. To me the good old days, I guess, include when I was a kid riding without seat belts in the back of the station wagon, and we'd go past signs that said, "Impeach Earl Warren," and we don't see that today.

But I think what is different from when I was growing up and down through the years since then is I don't remember a time that members of Congress have campaigned against the entire judicial branch. Certainly for years while I was growing up, I remember candidate Richard Nixon in 1968 campaigning effectively against the Supreme Court and the *Miranda*<sup>47</sup> decision and all those decisions, but not against the entire judiciary that I can recall.

Now we can go to the bookstores and we see books about the imperial judiciary, and there's always anecdotes about some district judge somewhere having done this and isn't that horrible. And I think that is different both in tone and in substance that it's not just the folks at the top, it's also the rest of us who are trying to make sense out of and apply what the folks at the top are doing.

So I think on balance and trying to approach it with a great deal of caution, I agree with Judge Flaum.

**MAGISTRATE JUDGE BAKER:** Justice Shepard, from your perspective as the Chief Justice of the Indiana Supreme Court looking at the federal system, what is the impression that you get in terms of those relations? And then if you could also speak briefly on the relationship of the state court judges to the state legislature.

**CHIEF JUSTICE SHEPARD:** I think Bob Miller has just made an important point about the intertwining of political efforts during election periods

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47. *Miranda v. Arizona*, 384 U.S. 436 (1966).

and the activities of the judiciary.

I was at a meeting once in the spring of '05 in which one chief justice said to Chief Justice Marshall, "I thank you for the president's reelection." And by that he meant that the placement of gay marriage referenda in a series of strategic states altered who turned out to vote for President.<sup>48</sup>

So, there is a level of sophistication that didn't exist before, it seems to me, about how the judiciary can be used as a fulcrum, not because the people involved necessarily care about judges. Nobody really thought that the Ohio Supreme Court was going to insist on gay marriage, but they did think if they could get it on the ballot, it would alter how they voted for President. And that's a very novel thing in our history. I think it has a limited play, but it hasn't played out yet.

I would say my own assessment of the Congress and federal judiciary is a little less fulsome than Judge Barker. It seems to me it's hard to not simply talk about this without talking about the people. Jim Sensenbrenner isn't running the House committee anymore, and that's a net plus in terms of lowering the temperature. On the other hand, moveon.org is now running the Senate Judiciary Committee, and that's a net negative for everybody. And that's a long-term problem that I think nobody has yet figured out what to do about.

In terms of the value of the relationship, I think, and I think most of my colleagues and many of our trial court colleagues think of the other branches and our relationship with them on a regular basis. And we deem it important because, for example, they are the people who either will or will not give us the resources to improve public defender systems in our state. That doesn't mean we're not in a position to trade off a decision in *Smith versus Jones*; we don't have that kind of chip. But if you prove yourself to be a straight talker and you take some care in what you ask for, and when you ask for it, you say, "Hello," and "Good morning," to people and all the things we learned back in kindergarten at the right moment, you're more likely to be successful at that than not.

So, whether the relationship—we put a value on whether that's a good relationship, and the one thing we can do is be helpful to them in certain areas of administration. What are the things that they're worried about or pressures they feel? One of the most recent ones was is there anything that could be done about the sentencing scheme in the state. And judges know a lot about that, and we have been willing to participate, not in the—obviously not in the end, not in deciding what will get enacted, but we do participate in very formal ways in the conversation. That seemed to me to lead to the betterment of the republic.

**MAGISTRATE JUDGE BAKER:** Professor Magliocca spoke this morning about putting the Chief Justice on Capitol Hill and opening a dialogue through that process. It reminded me to some degree of what you do through the State of the Judiciary speech every year.<sup>49</sup> It's a little different, I think, his

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48. See, e.g., Anthony Champagne, *The Politics of Criticizing Judges*, 39 LOY. L.A. L. REV. 839, 847-48 (2006).

49. For transcripts of the Annual State of the Judiciary Speech since 1988, see Indiana

proposal, than exactly what you do.

But do you think going in front of the legislature like that helps build relationships? And what is your opinion on the proposal that was set forth by Professor Magliocca?

**CHIEF JUSTICE SHEPARD:** I'm in favor of it. I would say that it's been a very valuable tool for us. You don't really build relationships by giving the speech. I mean, that's a little more hands—you know, you do that through things that are much more hands-on than getting up on the podium.

I've forgotten which of the three it was who said we know there's a message, but we'd flunk a quiz on what was in it. It's an incredible opportunity to be able to speak to the whole 150 at the same time and say here are the five things we're trying to achieve, here is where we could use some help, here is what we've done that we're proud of, here is our list of objectives and to know that at least for that moment they have all focused on what the needs of the third branch are and what its aspirations are.

We have tried in every way to make that event to look like the State of the Union, if you will. I think the second year I did it. I invited Governor Orr to come and listen. And since then every governor has decided that the governor would come and listen just as the Chief Justice comes and listens and the members of the court come and listen.

One of the great things about Justice Alito and a few of his colleagues is that there had been a deterioration of who went to the State of the Union. It got down to the point where only Stephen Breyer would go, and the others would have dental appointments or something.

*(Laughter)*

I think in the last speech there were four: Roberts, Alito, Breyer, and somebody else. I've forgotten who the fourth one was. I don't think there were five. But I thought that was a mistake. I understood why it happened, what the judgments about it were, but I think it said something favorable about him and John Roberts and others. And Stephen Breyer particularly sort of kept that flame alive by going there and sitting in the front row. The whole country is here, the diplomatic corps, the military is over in their row. That's retail politics as well. You shake a lot of hands on your way out the door.

**MAGISTRATE JUDGE BAKER:** Judge Barker, what do you think about the proposal set forth for the Chief Justice?

**JUDGE BARKER:** I was interested in the discussion, of course. There have been lots of efforts over the years. Brookings has made efforts, and other think tanks such as that, to have these inter-branch conferences and communications on a regular basis. They always peter out, and it's always because of legislative branch disinterest.

So you'll have a burden of proof in getting the legislature to express the threshold level of interest to do this, to get them there. It's got to matter to the Congress. Over the years it's been very interesting to me how scant the

understanding is by members of Congress about what the courts actually do, how a judge actually decides a case, what the procedures are. It's reflective of the fact that a lot of them aren't lawyers and some of the lawyers never practiced law.

But in terms of a clear understanding of what we do, it's more often missing than there. So, the first problem is that practical problem in getting the interest up to structure such a visit.

My more prevalent view and response to it was that it has the potential—we talked about this today, or some did about the risks attached to that—to be a very hard thing to stop doing once you've started doing it because then it really looks like an affront. If the Chief Justice says, "I'm not going to take any more of that. I mean I got elbowed and beaten up on, and they're asking me about cases, and they're asking me about why the Supreme Court decided such and so, and they're asking me about why we don't follow precedent, and it's just not appropriate."

So, I think that's one of the dangers that if you start it, it's going to be way harder to end it if it's not working out.

**MAGISTRATE JUDGE BAKER:** Any other thoughts on that proposal?

**CHIEF JUDGE McKINNEY:** Yeah, I would have one suggestion and that would be to say that we do have a conversation with the legislative branch, but we have it through our administrative offices and their staffers and our staffers and that kind of thing. Perhaps now is the time to convince the Chief Justice that he could go before the Congress and speak about what his administrative duties are, what cost-saving efforts the judiciary is up to, what our case loads are and what that does to both the cost of operation and the efficiency of operation, and to let them know about the Judicial Council and all of its committees. There are I don't know how many committees on the Judicial Council, and they're all up to improving the judicial branch and being responsive to the requests of the legislature.

**JUDGE BARKER:** Could I just add to that?

**MAGISTRATE JUDGE BAKER:** Sure.

**JUDGE BARKER:** The Judicial Conference sessions happen twice a year. It's the policy-making body for the courts, the federal courts. At the beginning of each conference session, the leadership of the judicial committees in Congress is invited to come and make remarks to the conference. I've served on the conference, so I was there, and I listened.

But I've also heard about those appearances over the years. And more often than not, certain of the legislative leaders who come to the conference—and it's a room of judges from all over the country, the chief judge of each circuit and one district judge representative from each circuit, so it's high level—they just use it as an opportunity for tirades and criticisms, saying that the judges are high-handed and not doing right by the resources that are given, spending too much money, that sort of thing.

So it's not a healthy exchange even in that structured setting. The judges typically just sort of sit there and take it. And almost always the member of Congress who's speaking leaves right after that, so there's no colloquy.

There's a lot of room for repairing the relationships here. You know, for a long time—since you said Sensenbrenner, I'll say his name out loud, too. That's who I was referring to, of course. For a long time he would not speak to judges.

He was chairman of the House Judiciary Committee and he would not speak to judges. He said he only spoke to one judge, that was Chief Justice Rehnquist, "so don't come see me," he said.

Well, that committee is the committee through which all the requests for resources go, judgeships, everything, salary; and he didn't like us, so he just closed the door. But it's hard to have a good relationship with somebody who won't let you in, and you never work out anything that way.

Just one other little tagline, and I'll stop talking. Randy touched on this. Where we see it in the trenches at the district court level, this tension is when it shows up in budgetary ways. We've had to cut back our probation departments. We've had to cut back on the clerk's office functions. Now we're talking about curtailments of judicial chambers staff, all related to the amount of money that's made available to us. The other way is by the burgeoning number of causes of action that continue to flow out of Congress without the offsetting resources to deal with it.

So we see it in really nuts-and-bolts, practical, how long is your workday ways.

**CHIEF JUSTICE SHEPARD:** The strategy I use for sort of the Sensenbrenner-type problem—it's a very long-term effort—is what I think of as the "back-bencher approach." Sooner or later the back bench is going to be sitting down front, that's especially true in Congress. You occasionally, you just—so who are the new kids and who do we know, who's got a relationship with this or that representative or senator? The last two years we have tried doing introductory lunches with new people; didn't work as well as I thought. I think we're going to have to re-jiggle that approach.

We have a tremendous advantage of being in the same building. Sometimes you just have to outlive them, right?

**JUDGE BARKER:** I'm working on it.

*(Laughter)*

**CHIEF JUSTICE SHEPARD:** Working on it. And to work back, there are obligatory communications with the leadership; they're obviously the most crucial. But next year it might be the person who's sitting three chairs away who is going to leap to the front of the crowd, and you just have to make an investment in that possibility. It's not very fancy and it takes time, but so far it's working for us.

**MAGISTRATE JUDGE BAKER:** Is that how you got the judges a pay raise in the state?

**CHIEF JUSTICE SHEPARD:** Well, Chief Judge John Baker has spent more hours on that than the rest of us put together. But a little at a time, there are a lot of people who can—you know, we have a marvelous alignment of stars, but the other thing about pay is that if the only time they see you is when you're asking for money, they achieve a vision of what you're about. What's this encounter likely to be?

So we've been very conscious about trying to find occasions where we can make ourselves helpful in ways that do not detract from our central mission, and the sentencing example is the one that is an example of that. There are other places where we try to prove that we can be good partners.



**MAGISTRATE JUDGE BAKER:** We'll come back to the pay raise issue a little bit later. That's a big issue obviously.

Let me switch gears. Professor Magliocca, were you taking notes here? You can still revise that article if you want.

**PROFESSOR MAGLIOCCA:** I can. Duly noted.

*(Laughter)*

**MAGISTRATE JUDGE BAKER:** All right. Let me switch gears on you. I want to set forth a quote from William LaForge, President of the Federal Bar Association, who wrote in a recent article, "At minimum, inappropriate criticism of the judiciary undermines public confidence in the judiciary and in judicial independence, regardless of whether the criticism actually influences the decision-making."<sup>50</sup>

So, Judge McKinney, do you agree with that?

**CHIEF JUDGE MCKINNEY:** Well, I know this sounds self-serving, but yeah, I certainly do. I certainly do. And one of the difficulties that we see when we get undue criticism—and sometimes the criticism may be due for a particular instance. For example, there was an awful lot of criticism of the O.J. Simpson trial. For the longest time, even in our voir dices, we had to include a little mention of that.

The point is that when the emphasis is made on a situation like that, people don't see the 99.9% of the other cases that don't do that. So the question is, if the first chicken you ever saw had two heads, how many one-headed chickens would you have to see in order to convince yourself that that first two-headed chicken was an aberration?

*(Laughter)*

**JUDGE BARKER:** I believe that's an Edinburgh example.

*(Laughter)*

**CHIEF JUDGE MCKINNEY:** I could have used goats and included Trafalgar.

*(Laughter)*

**MAGISTRATE JUDGE BAKER:** This is why I put them on the same side together over here.

*(Laughter)*

**CHIEF JUDGE MCKINNEY:** But that's the point. We are all open to criticism.

**MAGISTRATE JUDGE BAKER:** But the comment here is inappropriate criticism.

**CHIEF JUDGE MCKINNEY:** I understand that and inappropriate comes from not understanding what the three branches of government are up to, not understanding the kinds of things that judges do routinely, not appreciating civic responsibilities of jury service, those kinds of things. And some of those things are inappropriate, and it is a problem, and it causes a mistrust of the final closure of the case, which is not a good thing.

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50. William N. LaForge, *Judicial Independence: An Age-Old Concept Is Alive and Well but Has Contemporary Challenges*, FED. LAW, Nov.-Dec. 2006, at 3, 5.

**MAGISTRATE JUDGE BAKER:** Well, you were involved in the Perry Township School Board case which generated all types of press and letters to the editor.<sup>51</sup> Judge Barker has had her Ten Commandments cases and many others.<sup>52</sup> Judge Hamilton had his statehouse prayer case.<sup>53</sup>

Now, Judge Miller, you've never had any controversial cases.

*(Laughter)*

**CHIEF JUDGE MILLER:** I stay completely—

*(Laughter)*

**MAGISTRATE JUDGE BAKER:** Those letters to the editor, those news stories, what impact, if any, does that have?

**JUDGE BARKER:** Well, first of all, we read them. So any judges who say they don't read the press conference are probably spoofing you. But you look to see what the criticism is because we sense deeply that we're accountable. We're public officials, and there are things that we do that we ought to be held accountable for. If I'm not speedy enough in a decision, somebody can fairly say, "Come on, Barker, pick it up." Or if I'm not civil in some exchange, it's entirely appropriate for somebody to say, "Woo-hoo, back off a little bit on that."

But if they're saying I rigged the system to get a particular case because I have a particular bias—and early on when I got the Indianapolis pornography ordinance case and I was the only woman on our court, a lot of people thought I had engineered that, that I had something I wanted to say in that context.

**CHIEF JUDGE McKINNEY:** Actually, I engineered that.

*(Laughter)*

**JUDGE BARKER:** I know that's not true because you were in Johnson County at the time, and you've never read a newspaper.

*(Laughter)*

**CHIEF JUDGE McKINNEY:** Guilty.

*(Laughter)*

**JUDGE BARKER:** Or when they say that you do something because you favored the lawyers on one side or the other, or when they say something that is entirely related to the merits of the case that a jury decided. I may be the trial judge, and the jury made the decision, but it gets assigned to me, those turn out to be personal attacks on the way the job of judging is being done.

It's like Justice Alito said today, the criticisms that are unjust and the criticisms that are unfair and inappropriate are the ones that go to the heart of the institution. When you undermine the people who are trying to effect the goals of the branch or the institution, you're diminishing the ability of the branch to perform the entrusted responsibilities.

So those are the ones that are unjust. Those are the ones that after you've read them, you throw the newspaper down and you say, "Oh, stupid." But when

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51. *Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014 (7th Cir. 1997) (appealing decision of Judge McKinney).

52. *Kimbley v. Lawrence County*, 119 F. Supp. 2d 856 (S.D. Ind. 2000); *Ind. Civ. Liberties Union v. O'Bannon*, 110 F. Supp. 2d 842 (S.D. Ind. 2000), *aff'd*, 259 F.3d 766 (7th Cir. 2001).

53. *Hinrichs v. Bosma*, 410 F. Supp. 2d 745 (S.D. Ind. 2006).

it comes through with a criticism that you ought to hear, you hope to have enough detachment to hear it.

**CHIEF JUDGE MILLER:** It's difficult because we live in an age where political discourse, the partisan political discourse, has become more about motive than message. That if one side doesn't like what the other side is saying, we attack their motive for saying it or their moral authority to say it more so than any time I can remember.

And maybe that's fine when it comes to partisan politics, but when you do it with respect to a judge, now you, as Judge Barker was saying, go to the heart of the system. If I'm accused of making a wrong decision, that's fine. Heaven knows that people tell the court of appeals that every day of the week that I made a wrong decision. If it gets in the paper that somebody said that, that comes with the territory. I'm a public official, and you've got to have some degree of thick skin.

But if they say I did it because of the politics involved in the case or I did it because of the people involved in the case, now you're undermining faith not just in me, but in the system. Because the people that are out there and are learning to distrust these people with bad motives in Congress and in the legislature and in the Justice Department and the White House and all, they will draw that conclusion, too, and lose faith in the system.

It's hard to explain to anybody, but I really do think it plays out differently if you attack a judge for motives rather than the decision, than if you attack a senator, congressman, candidate, whatever. That may sound self-serving and probably is.

**MAGISTRATE JUDGE BAKER:** Do you have any additional thoughts?

**CHIEF JUSTICE SHEPARD:** Well, just two. One is the question is not whether there will be unfair criticism. The question that's important to me is what can we do about that. One little thing that we can do, and I think our judiciary does a superb job at this, is to be careful about what we say about each other. That is to say, what do dissenters say about the majority opinion? What does the majority say about the dissenters? What does the writing judge say about how the trial judge acted on this particular point? It's leading by example. That's the honorable thing to do anyway, but it is a contribution towards a healthier dialogue.

But the tougher question is what do you do about all those other actors, or is there anything you can do about the other actors? And I've come to the conclusion that your chance of controlling them is minimal. But you might be able to make a contribution towards how people hear it. How does the public assess unfair criticism? And sometimes that can turn out very well.

I mean, I think the score in the Terri Schiavo case was courts fourteen, Congress six. In the end the judgment of the American people was that the judges did the right thing, both state and federal, and that why in the world is the Congress of the United States out trying to legislate in a particular case in Florida.<sup>54</sup>

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54. Schiavo *ex rel.* Schindler v. Schiavo, 357 F. Supp. 2d 1378 (M.D. Fl.), *aff'd*, 403 F.3d

But in the long run, we're working on things that will help the people of our state understand the system better. We have a very energetic public education program that's been growing in the last three or four years. And the data—some of the same polling data that Professor Geyh referred to earlier—indicates that level of knowledge among the average citizen affects whether unfair criticism resonates or doesn't. Fair criticism is a whole different ball game. I take it, read it, assess it as we might.

But the one thing we can do is help our fellow citizens have a stronger basis on which to figure out whether this is bogus criticism or legitimate criticism, and that's part of our job. It's a way of, it seems to me, trying to build a better base for judicial action and legal action. Judges and lawyers are in the same boat on this point.

**MAGISTRATE JUDGE BAKER:** You've touched on two things that I want to follow up on. One was the Terri Schiavo case,<sup>55</sup> and the other one was the way in which judges interact with each other in writing their opinions or in other ways that judges interact with each other.

One of the things that was very publicized recently was the Wisconsin State Supreme Court race in which a couple of the candidates for the Wisconsin Supreme Court played out in a very bitter rivalry in the paper accusing one of being a liar, the other one accusing the sitting judge of having a conflict of interest on cases, which didn't do a whole lot to help hold the judiciary in a high regard.

My question is to the panel: How can we expect legislatures to treat judges appropriately if things like bitter dissents and opinions or the way judges treat each other publicly is so negative?

Judge Barker?

**JUDGE BARKER:** Well, the tone matters. It's just what Randy said. How you say that you disagree with a particular principle is going to carry weight, and so you have to be careful.

I haven't served on an appellate court, except by designation a few times to the Seventh Circuit, and the problem didn't really present itself. But I can tell you in the district court that we have our own mores for dealing with each other, even though we don't jointly decide things. For one thing, we never criticize each other for a particular opinion. We may sort of joke about, oh, yeah, the Seventh Circuit didn't get it that time, you know, or something like that, something reinforcing.

But if we have a disagreement, we don't call down the hall and say, "Jiminy Christmas, what were you doing on that?"

Actually, I have a perfect example from my own early days as a judge. I was trying a case to a jury, and the lawyers had asked for a special verdict. And I hadn't had any experience with special verdicts. I didn't have any views about special verdicts. I had no experience about special verdicts.

So we got up to the noontime, and I called down and I was able to catch

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1223 (11th Cir. 2005) (per curiam).

55. *Id.*

Judge Dillin. I said, “Judge Dillin, have you ever used a special verdict?” He said, “One time.” He had already been a judge for a hundred years.

*(Laughter)*

He says, “One time.” I said, “One time?” He says, “Yep. Regretted it ever after.” And I said, “Well, how come?” And he said, “Well, it usually prolongs the deliberations. It threatens to have an inconsistent verdict as a result. You’re asking questions often that the jury doesn’t need to resolve in order to have some logic in it. So it gives them too much work to do.” And I said, “Yeah, yeah.” I said, “Well, listen, I’m trying this case about,” whatever it was, “employment discrimination, and I’ve got”—and he says, “Of course, I don’t know about your case. I don’t want to know about your case. I’m just telling you, one time with a special verdict.”

*(Laughter)*

And I thought at the time, you remember how Judge Dillin could sometimes make you walk away thinking, “Oh, I’m really pretty stupid.” So it hurt my feelings for about fifteen seconds, and then I thought, “How wise is that!” He wasn’t going to let me invite him into my decision-making. He said that was mine. And that was wise.

**MAGISTRATE JUDGE BAKER:** Anyone else want to pick that one up?

All right. We heard Professor Geyh earlier today ask whether the public really cares, and I think I heard him say yes but no, yes and no but ultimately yes.

**JUDGE BARKER:** That’s why he’s a professor.

*(Laughter)*

**MAGISTRATE JUDGE BAKER:** Exactly. That’s why we asked him to talk today.

But I’m curious what our panelists think about that. You all come into contact with witnesses, prospective jurors all the time. You have a sense of whether the public cares. Judge McKinney, you’ve been known to call the prospective jurors your ambassadors of the judicial system. Does the public care?

**CHIEF JUDGE MCKINNEY:** I was tempted to have the court reporter read back what Professor Geyh said on that, but I don’t think he got it all.

*(Laughter)*

Sure, I talk to those jurors every time. Every time there’s a decision I go in and talk to them, and there are a couple reasons for it. One is because they’re pretty emotional at that point, and they need closure before you turn them out on the street, and you want them to feel comfortable with what they’ve just done, whether you agree with it or not. You want them to go back out into their neighborhoods and explain that what’s going on there at the courthouse is important, and that the lawyers are trying their best to give you what you need to make a decision. I think that’s extremely important as an educational tool because I think people really do care what goes on at the courthouse.

That’s one of the problems with the diminishing jury trials: You get fewer and fewer opportunities to introduce this wonderful jury service, this wonderful exercise of civic responsibility to individuals because they respond so well to it. They do such a wonderful job trying to understand what’s going on, even in the more difficult cases.

So I don't know that they worry about judicial independence, but I do think people are concerned about the level of fairness that goes on at the courthouse. They do read all the aberrations in the newspaper every time there's some huge verdict. The paper doesn't generally go on and talk about how much of that verdict was later reduced, or as we heard this morning, they don't talk about how many times McDonald's got warned about the heat of their coffee, they don't read about that.

But I've had more than one juror after we're done say, "You know, I'll read those newspaper articles differently. I'll look at this differently when I see it next time, and I'll have a little more respect for what those people had to go through to arrive at that decision."

**MAGISTRATE JUDGE BAKER:** Do you have many members of the public come down and watch your court proceedings if it's not a high-profile case? And I'm not talking about the Boy Scout troop that's coming down there for a civics lesson. Do you have many people stop in on you?

**CHIEF JUDGE McKINNEY:** Not since I quit hearing divorces.

*(Laughter)*

**MAGISTRATE JUDGE BAKER:** You don't usually have many, do you?

**CHIEF JUDGE McKINNEY:** No, we don't. No, they took the benches away. People are doing something else, I guess.

**MAGISTRATE JUDGE BAKER:** They still have benches but—

**CHIEF JUDGE McKINNEY:** I meant outside the courthouse. They don't hang around the courthouse like they used to.

**MAGISTRATE JUDGE BAKER:** Judge Miller, how about the Northern District? Do you think the people care? And do they come watch you do your job?

**CHIEF JUDGE MILLER:** They can't get past security for the most part. The lawyers are fortunate to get through.

**MAGISTRATE JUDGE BAKER:** They can if they have their ID and they don't have a camera, right?

**CHIEF JUDGE MILLER:** That's right. And are willing to leave their shoes behind and that sort of thing.

*(Laughter)*

I think people care very much that the court system is working. I really think that's one of the biggest problems we have right now in the sense that everybody wants the court system to work, but I think we're divided very much, at least in northern Indiana, and, from what I can tell, all over the country, as to who believes it is working well. The minority community believes it is not working well and has a diminishing faith particularly in the criminal justice system, but the civil justice system as well.

But I agree with Judge McKinney as far as people who come to court, who we can get there. If we can get them there for jury service or for some other role in the courthouse, they want very much for the system to be working, and they care very much that the system has what it takes to work.

So, yes, I do think to the extent they understand judicial independence is tied in with the courts operating appropriately and functioning well, I think they're very much in favor of it. My concern is the division as to who thinks it is

working and who thinks it isn't.

**JUDGE BARKER:** Tim, we use jury questionnaires, and the jury sends them back after their service. Often I talk to them, too, but they'll send back these paper evaluations of the lawyers and the process. Almost all of them express surprise that it was a better experience than they expected, and they're appreciative of the court personnel and the attention that they get and that it was meaningful.

I have a little copy of one of them that I got back that says about jury service, "When I came in, I really didn't want to serve. But afterwards, I was so glad I did." And I read that to the juries when I'm impaneling them, saying "This is what one of your fellow jurors said."

It occurred to me this morning, when our three congressmen were here, how true it is for congressmen and, I think, for judges as well that while people have this sort of generalized negative dislike of Congress, they like their congressman. And it's true of judges, that the people may not be all so shot up with the judiciary and the court system and everything, but as soon as they have a relationship with a judge who doesn't wind up in putting them on the spot or something, they tend to like that individual judge whom they've come to know.

And it's true for our magistrate judges, for our bankruptcy judges who are on the front lines and see way more people than we do in the district court. I mean, they really get first-class treatment when they get the full attention of those judicial officers to help work out a real problem in their lives.

**MAGISTRATE JUDGE BAKER:** I definitely see that.

Justice Shepard, what about from the state court perspective?

**CHIEF JUSTICE SHEPARD:** Well, I was just going to say, going back to the last question you had, that up against these experiences one must match things like the Wisconsin election, you know, where millions of dollars are spent to convince 51% of the voters that the other guy is a crook. By the way, I saw the other day that the other guy did plead guilty—the other gal pled guilty and proposes to take a reprimand from the court on which she now sits.

Surely it's the case that the spending of millions of dollars in that way, and, I'll argue later if we ever get to it, the same principle applies in confirmation hearings in the federal system. To the extent that those food fights are absorbed by the voters, a lot of the good experiences that they have are diminished. And the campaign example, or the high-visibility confirmation hearing example, has the capacity to kind of wash over all of these efforts that we make at showing—we've had a very good experience showing jurors introductory films. Here is your role, we now have a really very high class video that we use, we're about to revise it, to cover changes in the jury rules.

But I'm not very sanguine about public attitudes in general because of where I think we're headed on elections and confirmations.

**MAGISTRATE JUDGE BAKER:** All right. I told you I wanted to follow up on two things you said, the other one was the Terri Schiavo case<sup>56</sup> which obviously drew a lot of publicity.

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56. *Id.*

Tom DeLay, former Representative Tom DeLay, made a comment after the Schiavo case and I'm going to quote part of that. He said:

The legislative branch has certain responsibilities and obligations given to us by the Constitution. We set the jurisdiction of the courts. We set up the courts. We can unseat the courts. We have the power of the purse. We have oversight of how we spend their money. All of these are oversight tools.<sup>57</sup>

Pretty strong language from Representative DeLay, and something I want to explore with our panel.

Judge Miller, to what extent would you either agree or disagree with Representative DeLay? And if you don't completely agree with him, what is the proper oversight role of Congress as it relates to the way the courts are run?

**CHIEF JUDGE MILLER:** Well, I don't think you can disagree with any of those single sentences. Each of those sentences are true. But to the extent they come about then and because of this decision we will exercise those powers differently, that's where I think you get the threat to judicial independence.

But it's true, they do have all the—they confirm us, they can impeach us, they can reduce our funding. They can't reduce our pay, but they can certainly change our staffing and take away probation officers and all that sort of thing. So, all those things are true.

I think the implicit threat, though, is that “and, therefore, if they do not decide these cases as we believe they should,” we being whoever has 51% of the legislature at the time, “that we will punish them accordingly.” That, I think, most people would not agree with, most American people would not agree with, but that's the implicit—

**MAGISTRATE JUDGE BAKER:** So, what's the way to do that? They take away your funding and do this and do that to you, but they just don't tell you it's because of a certain ruling you made? If they have that authority, how do you know when they're exercising it properly and when they're not?

**CHIEF JUDGE MILLER:** I haven't had to make that decision yet.

**MAGISTRATE JUDGE BAKER:** Judge Barker, what are your observations in that regard?

**JUDGE BARKER:** Well, like so much Tom DeLay said when he was in public office, I believe it was intended to intimidate the judges. There's a reason, I suppose, he's gone back to being an exterminator as his profession.

*(Laughter)*

He was never a fan of the courts or the judiciary, and he wanted judges to know that. So he was doing what my mother used to regard to as unseemly behavior: He was “Big Ike-ing.” He said, “I'm bigger than you are. I've got more power than you do.” That means, in a bullying way, “you better do what

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57. Rick Klein, *DeLay Apologizes for Blaming Federal Judges in Schiavo Case but House Leader Calls for Probe of 'Judicial Activism,'* BOSTON GLOBE, Apr. 14, 2005, at A9, available at [http://www.boston.com/news/nation/washington/articles/2005/04/14/delay\\_apologizes\\_for\\_blaming\\_judges/](http://www.boston.com/news/nation/washington/articles/2005/04/14/delay_apologizes_for_blaming_judges/).



I want you to do.”

Now, the legislative branch in this tripartite, balanced, checks-and-balance system, the legislative branch has a special obligation to the judiciary branch, which you’ve heard described as the weakest branch. We don’t have any constituencies. Sometimes we can get lawyers to speak for us, but we’re very few people and we don’t have the power of the purse. We just do this one task that’s assigned to us by the Constitution.

The legislative branch has a particular responsibility to make sure that all the branches of government function well and properly. And the atmospherics come into play between and among the branches when you talk about common problems, and you can make a candid disclosure to one or the other branches about what you need and what’s not being served or serviced properly by the relationship with the other branches. It’s got to be open; it’s got to be collegial. It’s got to be with everybody moving essentially in the same direction towards better government.

So when you hear a diatribe like that, it’s like any other fight. Those are just fighting words. He’s right technically. Yeah, Congress has all those powers, but their obligation is to use them to better government across the board, even the judicial branch.

**MAGISTRATE JUDGE BAKER:** Do you have something else you wanted to add, Judge McKinney?

**CHIEF JUDGE MCKINNEY:** Just to echo what Justice Shepard said about how judges ought to treat each other. I think we have to be careful what we say about Congress. We don’t want to have any public writings that would be interpreted by a congressman as I can interpret what Representative DeLay said. We need to be a little more careful with that.

**MAGISTRATE JUDGE BAKER:** There was some discussion this morning, quite a bit by the representatives, about jurisdiction stripping. We’ve talked about a couple of those bills that were proposed and they’re in various phases. But I just want to take a minute to talk about those and see what the impact of those are.

There have been several, some that are pending now, some bills that have been pending in the legislature last year. A couple that are pending now would include the Pledge Protection Act of 2007,<sup>58</sup> pending in the House. The goal of that legislation was to limit judicial interpretation of the Pledge of Allegiance by restricting jurisdiction over those cases to the District of Columbia courts and the U.S. Supreme Court.

There was the 2007 We the People Act,<sup>59</sup> which would limit the federal courts’ jurisdiction in cases involving religious freedom, sexual orientation or practices, or same-sex marriages, and would also make decisions by federal courts on these issues non-precedential on state courts.

There was the Marriage Protection Act,<sup>60</sup> which would have defined the

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58. H.R. 699, 110th Cong. (2007).

59. H.R. 300, 110th Cong. (2007).

60. H.R. 724, 110th Cong. (2007).

federal courts' jurisdiction—excuse me, would have denied the federal courts' jurisdiction to interpret portions of the Defense of Marriage Act. There was also the Constitution Restoration Act,<sup>61</sup> which Representative Pence discussed this morning as you may recall, which would have prohibited the United States Supreme Court and the federal district courts from exercising jurisdiction over matters involving a government entity or official who acknowledged God as the sovereign source of law, liberty or government, and would have prevented U.S. courts from relying on the laws or policies of foreign governments when interpreting the Constitution, among other things.

These are just some of the laws that are either pending in the House of Representatives or have been proposed in prior legislatures. But, to my knowledge, those laws have not passed. They have advanced; some have been approved by the House and died in committee when proposed in the Senate.

But my question to the panel is: Are these types of legislations appropriate exercises of congressional authority? Is it mere saber rattling? Is there any realistic possibility that this type of legislation would actually be passed into law?

Judge Barker.

**JUDGE BARKER:** Well, it's saber rattling, but it's not mere saber rattling. All of these issues are hot-button issues. They're issues about which there is a lot of disagreement within the body politic. And people feel very strongly about these issues; these are not things that people are neutral about.

So when a court comes out with some interpretation of the law and hands down a decision that strikes some people as wrong or offensive or un-American or unreligious, whatever the reason is, to be able to come back with a bill that basically pulls the jurisdiction out of the federal courts to resolve these most heated of all disagreements and issues, I always wonder who they think is going to resolve these things? I mean, if it's not the courts, are we just going to let people duke it out on the streets and say for example about abortion? Pro life? Pro choice? Or are we going to bring these issues within the civilized forums and let them be resolved under the rule of law in accordance with law?

It would be so much better, I think, instead of coming up with some proposal to pull these out of the courts to try to deal in a more nuanced way with the underlying struggles so you can actually craft a compromise. We are a very large and diverse country, and we have to all try to live together under the rule of law. And that means there has to be some very thoughtful legislating going on that says, "Here are ways that we can craft a midway point so that people can have the maximum amount of freedom to live their lives and pursue happiness," etc. When court-stripping bills get introduced, it's a distraction and it's counterproductive because it pulls you away from doing the hard work of nuanced legislation that takes into account this great diversity.

The Feeney amendment<sup>62</sup> sort of stands in the minds of all of us district

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61. S. 520, 109th Cong. (2005).

62. Protect Act, Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified in scattered sections of 18, 28, and 24 U.S.C.).

judges as the best recent example of this problem. Mr. Feeney is a congressman from Florida who introduced as a rider to a bill to limit federal district courts' sentencing discretion for cases involving sexual predators or child pornography kinds of cases; it was intended to reduce departures. The provision said to the district court judges you will operate under sentencing guidelines, but in these cases you can't depart downward.

There were no hearings. There was no discussion. Nobody called up the Judicial Conference of the United States and the Criminal Law Committee or the Sentencing Commission and said, "What do you think about this? How would this work? How would it impact the sentencing function?" The proposal simply showed up on the House floor. It slid through and was enacted and was wired over on the other side, and now that's the law. That's how it came about.

We don't operate under the sentencing guideline regimen as such any longer, which has neutralized the effect of the Feeney amendment. But that's how it happens, sort of in the dead of night.

**MAGISTRATE JUDGE BAKER:** Judge McKinney, do you have something else to add on that?

**CHIEF JUDGE MCKINNEY:** I'd just say this. In the past we've had some jurisdiction-stripping legislation that I thought was pretty wise. Black lung, for example. You didn't hear black lung cases in the federal courts; those were all assigned to administrative matters, and that was it. I was looking forward personally to seeing that done with asbestos, but alas, that didn't occur. Now, if we want to do some jurisdiction stripping on a Sunday afternoon, that would be the kind of thing, it would seem to me, that we ought to look at it.

It's when we're double dribbling and traveling through the first four amendments to the Constitution when we get into some difficulty. So, I don't know, I wish them luck, and I hope I don't get any of those.

**MAGISTRATE JUDGE BAKER:** Justice Shepard, have you followed the debate at all in the jurisdiction stripping?

**CHIEF JUSTICE SHEPARD:** I do. And while I agree with what my friends have said, I really think this is a kind of an insider baseball topic. If you were to try to gather a group of citizens to concern them with fair and impartial courts and you led off with a discussion of jurisdiction stripping, you'd have made a mistake.

It is distracting, and it does happen in ways that are—but it doesn't happen very often. If you think about the interplay between Congress and the courts on jurisdiction, it's, I think, ironic to contemplate that *Marbury v. Madison*,<sup>63</sup> that great historic moment, is one in which Congress, the Court said, tried to give the courts too much power.

So do they have the authority to expand and contract in certain ways? Yes. Is it a good idea? Maybe some days it is, maybe some days it's not. Mostly it doesn't happen.

But it seems to me the real downside of it as a topic is that it has the same characteristic that Professor Geyh said about the term judicial independence. It's

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63. 5 U.S. 137 (1803).

a kind of a distancing proposition. It does not communicate to our fellow citizens what it is they have at stake in these discussions because it's a technician's topic. It doesn't tell them one way or the other whether they're going to get a fair shake when their brother gets arrested on a drug charge or when they've got a divorce or when they have a civil rights complaint. And the way we talk to them, the way the profession as a whole talks to them, is an important part of how we ought to try to conduct ourselves.

**JUDGE BARKER:** Yeah, but, Randy, what if the issue is not a divorce or an assault or something, but it's the Pledge of Allegiance or it's a flag issue and somebody feels strongly about that and they come knocking on the door of the court? I agree with you that court stripping and the way we talk about it is "insider baseball," but it has implications that go much wider.

So that citizen, when he got to the court and found out there was no protection for his views, would think that that was probably as important as his divorce.

**CHIEF JUSTICE SHEPARD:** I'm happy to say that the courts of general jurisdiction down at the county courthouse would be open to them on almost any of those claims. But I guess my real question would be, what's your second example after the Feeney amendment? See, it's worth contemplating, but it's sufficiently rare as compared to some of the other things we've already discussed that are, in fact, out there moving people's attitudes pro and con.

**JUDGE BARKER:** But since it is rare—I hope this is okay if we talk over you, Tim.

**MAGISTRATE JUDGE BAKER:** Oh, yes.

*(Laughter)*

**JUDGE BARKER:** If it is that rare, why are the legislators doing it at all?

**CHIEF JUSTICE SHEPARD:** Because it's one of the few things they can think of.

**JUDGE BARKER:** Exactly. That was my point.

**MAGISTRATE JUDGE BAKER:** All right. Well, let's move on.

*(Laughter)*

**CHIEF JUDGE MILLER:** Could I just add one point? And that's to follow up on what Randy just said. Congress can close the doors to my courthouse and the doors to the Seventh Circuit and possibly the doors to the Supreme Court, but the United States Congress can't close the door to the St. Joseph County courthouse.

When they want to keep me from deciding same-sex marriage cases, it was the Massachusetts Supreme Court that decided that, not a federal court. What these bills will do is that you'll be able to have same-sex marriages in Massachusetts, but probably not in Texas. On the other hand, in Texas you can probably pray before the football game, but not in Massachusetts. You will have these federal constitutional rights—federal constitutional rights—meaning different things in different states.

Your question was, is it appropriate? And I agree they've got the authority to do it, and sometimes we ask them to do it, like black lung or diversity jurisdiction back in the days when we had too many trials. But is it appropriate? I think that becomes the issue. They can't close the doors to all the courthouses,

but they can close the doors to the courthouses that can provide some degree of uniformity from coast to coast.

**MAGISTRATE JUDGE BAKER:** All right. Let me switch topics, although I'm going to stay with Justice Shepard on this next topic because he mentioned previously that he wanted to—

**JUDGE BARKER:** I'll help him, though.

*(Laughter)*

**MAGISTRATE JUDGE BAKER:** —he wanted to talk about the confirmation process a little bit. We heard from Justice Alito this morning who described his confirmation process as the three most difficult months of his life, going so far as to make an analogy to climbing Mt. Everest with dead bodies along the mountainside. So, that's pretty serious stuff.

During Justice Ginsburg's 1993 confirmation hearing, she was praised for her candor in answering questions about current legal issues, her views on stare decisis, constitutional and statutory interpretation, her personal reactions to controversial issues, and her opinions about resolution of issues in criminal and other areas of the law. However, notably, Justice Ginsburg refused to answer questions about unresolved issues that may come before the Court. The approach has been followed by subsequent nominees during confirmation hearings.

Justice Shepard, do you agree and do you believe that the confirmation hearing is an appropriate forum for inquiries about how a candidate would rule on specific issues? When you answer, you can also go ahead and elaborate on the other issues about confirmation I know you had on your mind.

**CHIEF JUSTICE SHEPARD:** Well, it can be and is and the Samuel Alito example is—ought it to be is the question. Senator Schumer was heard to say after the end of the Supreme Court's last term, "There will be no more Alitos." What he meant by that was, "I'm not going to let anybody get through the Judiciary Committee who doesn't make me more tangible promises than Judge Alito did when a nominee."

Now, the underlying idea of that is nobody—I attribute this upfront to Professor Bode. If it came to pass that you could not be confirmed unless your views of the Constitution suitably aligned to at least sixty members of the Senate, what kind of judiciary would we have? As Pat says, the Constitution was designed to protect us from that crowd and to circumvent its ability to take certain actions with respect to our day-to-day lives, like the Fourth Amendment.

If you can only be confirmed if you are prepared to make certain pledges about how you will interpret the Fourth Amendment, then the judiciary isn't a place where you can find refuge from statutes or actions taken by the executive branch. That's why Senator Schumer's declaration is so dangerous. It says, I want to know more. I'm sorry to say Senator Specter allowed this, as how he was going to go back through the transcripts and try to determine whether Judge Alito, Justice Alito, had broken certain promises that he made to the committee, is the way he put it.

This is a door that will swing both ways, you know. Once both parties legitimate the notion that you can't get past me unless I know that you're going

to vote to support *Roe v. Wade*<sup>64</sup> or to reverse it, then the Court is just another version of the Congress of the United States. It no longer has that sort of governor quality to it. It's no longer a weighty third place.

This is very like what's happening in state judicial elections. The striking down of various state judicial codes that restrain what people can say in elections causes the Wisconsin example, and it causes the Michigan example. And it did cause things like that where millions of dollars are raised, and there is an insistence on laying out policy positions about this or that, the result of which is that what the definition is of the law in that jurisdiction is decided in the ballot box in that wonderful environment of sound bite commercials. That's real good if your candidate won; but if your candidate didn't, you're just out of luck. Just wait for the next election, maybe you can elect a different judge.

But that's why the notion of pledges or promises either to get elected or to get—you know, there was a discussion in California about whether to convert from the retention system to confirmation. And the appellate judges in California looking at the federal confirmation process said, "Thanks, I'll stick with the public. I can go out and talk to them." And said, "We've decided we don't want to do confirmation in our legislative branch."

There are a lot of people in the Congress who understand this, it seems to me. Most of the district judges who have been ruling in state code cases do not, and they don't believe that they have anything at stake, and they do. So, I regard this as kind of a self-inflicted wound. I haven't yet heard how we're going to get out of it.

**MAGISTRATE JUDGE BAKER:** Judge Miller, what are your thoughts on that topic?

**CHIEF JUDGE MILLER:** I agree with what Chief Justice Shepard said. I think what the public often forgets and the legislature more often forgets is that when it comes to constitutional litigation, they are the democratic branch, we are anti-majoritarian. Our Constitution says that no matter how many people vote for a law, you can't take away the right to free speech, you can't establish religion; we can go down the line. We are the ones who have to say, "no, you're the majority in the Senate, you are the majority in the legislature, but it can't cross this line," and there's always going to be that tension there. Yet I think when you're into the confirmation hearings, obviously if it takes sixty votes, you effectively have to agree with the majority and promise to vote the way that day's majority wants you to vote; you're giving up that anti-majoritarian position that the Constitution requires you to take in certain types of cases.

**MAGISTRATE JUDGE BAKER:** Any further thoughts on confirmation?

**CHIEF JUDGE McKINNEY:** I can't improve on those comments.

**JUDGE BARKER:** I do want to add just one thing. I can't improve either, I just want to add something.

I didn't hear Justice Alito comment on—it would be tacky to say it was a complaint—but to comment on the questions that were asked of him. He didn't. I mean we remember that. We remember that there were these efforts made to

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64. 410 U.S. 113 (1973).

sort of push him out of his refusal to say how he would decide a particular controversy; we remember that. But what he was talking about was the process of nomination and confirmation and what a feeding frenzy the media creates and how it deprives a nominee of any ounce of privacy that he might otherwise want to try to preserve.

And my experience is that it's—remember in times past they would look at the VCR rentals and your library card usage? They would go around trying to find somebody who had something bad to say about you so that the media would have something to talk about or the opposing senators on the committee would be able to develop that point.

A long time ago when there were openings on the Seventh Circuit that were to be filled by Indiana judges and lawyers, I was enlisted at various times to see if there was somebody in southern Indiana, in our bar here in Indianapolis, in the Southern District. We've finally got three fine judges from the Northern District to serve, but I was asked to try to go around and see—I was on the district bench at the time—if there was somebody who would like to go on the Seventh Circuit from southern Indiana. It was at a time of really ugly confrontations on nominations. You remember the gauntlet that Dan Manion had to run to get confirmed. And I must have talked to ten or twelve lawyers seriously about it, not just, you know, while standing on a street corner. To a person they said, “Are you kidding? I wouldn't go through that process for anything, and I sure wouldn't go through it for that money.”

**MAGISTRATE JUDGE BAKER:** The perfect segue into judicial salary. Thank you, Judge Barker.

Let's talk about that. There's really only about ten minutes left in this presentation. Now, my guess is there might be some questions out here, and I want to give an opportunity for some questions. Let's do one more topic on judicial salaries and open it up to any questions because it's not very often that you get a panel like this, and I want to give you an opportunity to ask any questions that you have.

There's a bill pending in Congress, in the Senate. It would be a substantial pay raise for the judges. Of course, I'm all in favor of that; I want to make that clear. But I think we talk about a substantial raise, and as we talk about this, I think it's important that you talk about exactly what it is. So, let's look at the numbers.

The Senate bill introduced by Senator Leahy would increase the annual salary of district judges from approximately \$165,000 to \$247,000, and would increase the salary of the Chief Justice of the United States Supreme Court to approximately \$318,000.<sup>65</sup> Now, you contrast that with the median household income of somewhere around \$46,000, so I can't make this question too much of a softball. The question is why do judges deserve that much of a raise?

Judge McKinney, what do you think?

**CHIEF JUDGE McKINNEY:** Well, I can just say it will buy a lot of two-headed chickens for that much money.

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65. Federal Judicial Salary Restoration Act of 2007, S. 1638, 110th Cong. (2007).

*(Laughter)*

It's a struggle to say to my fellow Edinburghians that I'm worth 260,000 bucks when they're driving old cars and complaining about the price of gas and that kind of thing. The truth of it is—well, it's just difficult to deal with. But we do have what we heard this morning; we are fortunate enough to be in wonderfully responsible positions in the government. And we do represent a third of the government, and our responsibility is to resolve disputes, and that dispute resolution system is the envy of countries all over the world, and we are the front-line representatives of that institution. To that extent, as you look at who those representatives are and ask how much are they valued by the public, perhaps 260 is not such a horrible number. On individual levels, it can be hard to discuss, but on the broader picture of what the court does, what it's expected to do and the role it plays in our society, perhaps that's not such a bad number.

**MAGISTRATE JUDGE BAKER:** Well, the Federal Judges Association has been in the forefront of supporting and advocating on behalf of a pay raise.

Judge Barker, as president of that association, can you speak to the benefits of the bill?

**JUDGE BARKER:** Yes, I know maybe too much about this because this is a primary undertaking of the Federal Judges Association because we see it as so closely linked to issues of judicial independence. It has to do with what kind of judges do you want? It can't be a debate of whether Sarah Barker is worth it. It has to be a debate about what kind of judges do you want to make the decisions that are entrusted to the federal judiciary.

You'll lose the battle if you do it on the basis of individual personalities and where they live. I suppose, you know, a judge who lives in—pick a place—you know, Butte, Montana isn't going to have the cost of living and so forth and the competition among the bar that you'd have in the major metropolitan areas. But we provide salaries for judges across the board, and they're way out of sync. It's happened because of the problem of linkage, that's actually the word of art, because Congress has linked their salary increases to the judges.

You heard Congressman Hill today say, "If they get it, I get it." Then you heard Congressman Ellsworth say, "No, I made a political promise that until the budget is balanced I'm not going to take a pay raise."

So in the meantime the judges are whipsawed because of this, and the cost of living keeps going up, the professional salaries keep going up. I don't have to repeat what Justice Alito said today about the disparities between judicial pay and everyone else whom you would regard as comparable: deans of law schools, judges in other countries of comparable responsibility and standing. So it's a huge issue.

But some of the congressional representatives want to keep it linked, although I have to say that that's a matter of lesser influence these days. We're working daily, and that's literally true, daily, on this Senate bill, and we're about a week away, we think, from having a House bill put in, to move them through in this session of Congress. It takes a lot of talking and strategizing.

But the Chief Justice says, and Justice O'Connor says, and Justice Kennedy says morale is at an all-time low in the federal judiciary, and of course, in their experience, they're right. It's because we're not able to make this case clearly



enough to get it through the political branch. I must say, I hope you'll help us if you get a chance, but we're closer than we've been for a long time, but it's still a very steep hill to climb. And it's a very important issue to judges all over this country.

I had a judge call me two weeks ago and he said, "Sarah, I know you're working on this. I know you're working hard. We're making progress, etc., but I can't hang on much longer." He's in D.C., and he's got kids going to college and a higher cost of living there than we do here in Indianapolis. "How long do you think? Do you think it's going to happen? Can I hope that it's going to happen by January 1?"

And these are the hallway conversations. These are the conversations that judges are having. Another judge told me just yesterday, so-and-so judge is not going to last past the end of the year. It's another judge, I know that person is leaving.

We've had record numbers of departures from the federal judiciary, which is also a statistical fact. It didn't used to happen that way. Once you became a federal judge, you pretty much hung on. But Justice Alito painted the picture pretty accurately today with the numbers.

**MAGISTRATE JUDGE BAKER:** Thank you.

Justice Shepard, you are probably the most visible face on the pay raise that the state judges recently received. Other than a bigger paycheck that you now receive, can you speak briefly in closing on this topic to some of the other benefits that the pay raise has resulted in?

**CHIEF JUSTICE SHEPARD:** You know, when I saw this topic on our list this afternoon, I wrote, unlike all the others, I wrote a single word, "Morale." It's very hard to quantify whether that matters to everybody else. Does it matter to litigants? Does it matter to lawyers?

I've been to a lot of luncheons like the ones that Justice Alito mentioned in the courthouse in Trenton every Friday. I guess we are now happily at a moment where not only have we achieved a very substantial pay raise, but our General Assembly and the Governor have put into law a system that, if we can hold on to it, will make us relatively well over the long term. It will help keep us from this cyclical business. I mean, what happens is if you don't get it this year, and you don't get it next year, and you don't get it next year, all of a sudden the number is so big that the size of the number itself is a part of the political problem. With some luck and care and tending, that will not be a part of our future as it had been a part of our past.

But I would say in the state judiciary that, as I judge the change in morale, it is that judges have found the energy and the inclination to be interested in all sorts of very productive things. You can call a meeting and say, "Let's do something about the problem of court interpreters," or, "Let's put a committee to work on what the graying of America is going to be like once all the baby-boomers hit the retirement system and the nursing homes," and so on. Let's put a committee together and talk about that or any other variety of very fruitful and productive sort of things. And you get a very much more affirmative sort of response than you did back in the period when everybody knew that they were going to have to go home today and say to the spouse or the children, "How are

we going to make it?”

In that sense it's made the court system a much happier place to work and a much more effective place to work where everybody is not thinking about that as much anymore, but it's still a matter of interest and concern. Our judges are still not quite confident that this is for real, and it's only when it actually shows up in the paycheck that they believe it. But so far it is real, and it has had the effect of allowing people to have a more forward-moving attitude about what it is they're trying to achieve.

**MAGISTRATE JUDGE BAKER:** Thank you. We have maybe a minute or two. Are there any questions for our panel?

Professor Grove.

**PROFESSOR GROVE:** I wouldn't gainsay the importance of some significant raises for federal judges. It seems to me 50%, which is what's being proposed in the Senate bill and I thought there was House legislation mirroring that already.

**JUDGE BARKER:** Not yet.

**PROFESSOR GROVE:** But I read something from Judge Posner recently. Now, I mean some of this, there must be a way of sorting it out, but he says, first, there is not a shortage of highly qualified applicants; second, departures from the federal courts because of salaries is very rare.<sup>66</sup> He says that even a 50% increase isn't going to make much difference to, say, commercial lawyers who may be earning a million or two million dollars a year.<sup>67</sup>

So in the end, he says that the best argument for a pay raise is that people whose jobs give them a great deal of discretion, but who feel under-appreciated, can sort of take it out on everyone else by underperforming, which is not the kind of argument that's likely to appeal to Congress.

So who's right about this? Are there a lot of judges leaving because of salaries?

**JUDGE BARKER:** Yes, there was an article—actually, you can get it on the Administrative Office website. There's an article fairly recently identifying the judges who have left in the last two years or something because of salary.

You know, Posner's views are *sui generis*. I don't know of anybody else who views it that way and, when virtually all of the United States Supreme Court thinks otherwise, I just think he sort of marches to his own drummer on this.

**PROFESSOR GROVE:** It's a contrarian view, that's for sure, but still.

**MAGISTRATE JUDGE BAKER:** Professor Karlson.

**PROFESSOR KARLSON:** I'd like to make a comment along those lines, and that is one of the great reforms of the English Parliament in the late nineteenth, early twentieth century was paying members of Parliament. Before that, if you were not independently wealthy, you couldn't sit in parliament because you didn't have any money.

And similarly here, not only are we asking people to serve, but if we do not

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66. Posting of Richard Posner to the Becker-Posner Blog, <http://www.becker-posner-blog.com> (Mar. 18, 2007, 20:42 EST).

67. *Id.*

pay sufficient money, what we're really saying is if you don't have some independent basis of wealth, don't come to the judiciary. And that has a great impact on the type of people who ultimately become members of the judiciary.

I think it's very important that we recognize that you shouldn't have to have independent wealth to be able to sit as a federal judge and not in some way penalize your family for the choice you have made in serving your country.

**MAGISTRATE JUDGE BAKER:** That's one of the arguments Justice Roberts has advocated in favor for a pay raise.

Justice Boehm, did you have a comment?

**JUSTICE BOEHM:** Well, just following up on the point of underperforming, I can't document this, but on an anecdotal basis, I think all of my colleagues will confirm that the amount of time spent by the judiciary in Indiana in 2003 on its own internal affairs, on pay raise grousing, on general dissatisfaction with the state of the judiciary, is way down as a result of the legislation in 2005.

The other point I'd like to make is if you continue on the system we're on, our last pay raise in Indiana was 1995, and we finally got another one ten years later; you do the same thing with the federal system, you end up with these enormous jumps and then everybody says, well, we just gave you a 30% or 50% or a 100% pay raise last year so don't come around and see us for another decade.

In the meantime inflation works its way at everybody. Judges, rich people, poor people calibrate their standard of living to their current income more or less. If you start having 30% declines, which is at a minimum, what happens over a decade if no adjustment is made in nominal dollars is you start squeezing people materially from what their normal expectations are. You know, we've all seen the studies that show many people in parts of relatively impoverished countries are happy because they are living in levels which they regard as satisfactory. The same is true of Americans. If you take a bunch of Americans over time and reduce their standard of living by 30%, you do create a lot of dissatisfaction and psychological pressures and family disorders and all the side effects that we're talking about.

So it's not just a matter of conscious, willful malingering, or malperformance by judges; it has an inevitable collateral damage that's severe. And we've seen it corrected in the state judiciary significantly.

**MAGISTRATE JUDGE BAKER:** Thank you.

Well, I want to thank the members of the panel, and I hope you'll join me in doing so.

*(Applause)*

I also want to thank the Indiana State Bar Association again for their assistance and to the Law School for this wonderful facility and being our host today. For the conclusion of our conference today, we have a few closing remarks from the dean, Dean Roberts.

Dean Roberts.

## CLOSING REMARKS

**DEAN ROBERTS:** Well, this has been a fabulous day and I commend the Indiana State Bar for putting together such a terrific program which, of course, made me wonder who lost their mind when they had me giving the closing remarks. But why would you have a sports law guy get up here and talk about such a serious topic as this?

But knowing that there might be an outside chance that somebody actually wanted to hear just a couple of comments, I did jot down a couple thoughts, and I'll just leave you with those.

I do come at this as an antitrust lawyer primarily, which I think gives me an odd perspective, because the antitrust laws, I think, are a whole different animal than constitutional law and a whole different animal than most statutory regimes are. But the way I've always thought of this is that all three of our branches of government are very much political branches. They're populated by human beings who are in various ways subject to the influences of the will of the population, and I think that's as it should be.

However, I think deliberately the judicial branch was designed and operates as the branch that bends much more slowly to the political will of the people. It doesn't respond as quickly to fads and pressures as do the political branches. So, its purpose is to put a governor on mood swings among the people that are perhaps too fast and too extreme. But eventually, if the people lose confidence in the judiciary, then the judiciary is going to have to bend over time to that will.

I remember from law school—it's hard to believe I can remember anything from law school—but I remember reading Alexander Hamilton's Federalist Paper No. 78<sup>68</sup> where he pointed out that judges do not exercise either force or will, but merely judgment. And we have to remember judges command no armies; they have no bureaucracy; they really don't have power to do anything. The only authority or power they have is to the extent the other branches of government and the people of the nation are willing to respect their decisions and agree to follow them. So, ultimately it's important that the other branches of government and the people believe that it's important to have an independent judiciary.

Eventually, the judiciary and the popular will are going to have to converge in some way. You look down through our history; there are always tugs and pulls between the branches of government. In fact, today it's probably more relevant to have a conference on the relations between the executive and the legislative because that seems to be where more tensions exist today than between the legislative and the judiciary.

But I just leave you with a couple of things that I thought about as I was listening today. And that is that I don't think there are many people, no matter how angry they are at a court decision, who would disagree with the notion that the courts have legitimate authority to find legislative or state government conduct unconstitutional. The real issue is where you draw that line.

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68. THE FEDERALIST No. 78 (Alexander Hamilton).

Everybody agrees that at some level of extreme failure to comply with constitutional mandates, the courts need to step in. It's just a question of how quickly they should do that and what sort of legislative enactments or what sort of government conduct reaches the point where we need that kind of judicial intervention, and perhaps a debate or a disagreement over what the appropriate remedy should be when that happens.

With that thought in mind, that we're really not talking about black and white, but rather, like almost everything else in law, we're talking about shades of gray. I note that, with the perspective of history, courts sometimes really make bone-headed decisions. You don't want the courts to be completely independent when those sorts of things happen. If you go back and think *Dred Scott*<sup>69</sup> and *Plessy v. Ferguson*<sup>70</sup> and *Korematsu*<sup>71</sup> are just three cases that come to mind that as we look back on them we say, "Gee, we wish the judiciary hadn't acted the way it had."

On the other hand, I think probably the most important era in judicial evolution from my perspective is to say that sometimes the courts are the only branch of government sufficiently positioned to lead the country in ways that it morally needs to go. And perhaps the most obvious example is the civil rights movement.

I think as we look back, there's not many folks who would think that the Court was wrong to decide *Brown v. Board of Education*<sup>72</sup> the way it did. Perhaps it's the civil rights movement that has given, "judicial activism" a good name because it's the courts that forced this country into a moral imperative that the political branches were just simply not in a position to lead us.

So that's just an example, it seems to me, of the kind of balance you have to make. Sometimes we need the courts to be activists and to make controversial decisions because the country has to move forward; and sometimes the courts move a little further than a lot of people want them to, and the President may propose packing the Court, as FDR did in the '30s, or perhaps Congress will try to impeach a judge or two as happened to Justice Chase back in 1803.

But at the end of the day, I have to confess that I'm not that worried about it because this country has existed for 220 years now with these tugs and pulls and threats and saber rattling and these kinds of tensions all over the place, and yet somehow the pendulum always swings back, and cooler heads always prevail. So, I think that at the end of the day, the system of checks and balances works pretty well. Frankly, you know, whenever I see congressmen propose that we limit the jurisdiction of the courts to decide a specific kind of case, I frankly figure it's never going to happen because before that actually does happen, I think people in Congress will realize that the precedent that sets is really dangerous to the country. Every time it's ever happened, to my knowledge,

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69. *Dred Scott v. Sanford*, 60 U.S. 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV, § 1.

70. 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

71. *Korematsu v. United States*, 323 U.S. 214 (1944).

72. 347 U.S. 483 (1954).

cooler heads prevail, courts soften the way they deal with issues a little bit, and Congress moves on. A new President appoints new judges, and things kind of move towards the center, and the crisis passes, and I think that's probably what's likely to happen in the future as well.

But the fact that I'm not that worried ultimately about this—I think it's just a natural part of our political evolution that Congress and the courts have these tensions. That doesn't mean that conferences like this one aren't important, because it is precisely because we think about these things and precisely because we have these kinds of conversations between the branches of government and we force people to think about and reflect on the importance of maintaining an acceptable balance between each of the branches of government that we as a nation will, I think, always come out in the right place in this struggle.

So, as long as we have conferences like this, I think we'll be in great shape. So I want to thank everybody who participated and the judges who came today and Justice Alito and the congressmen who were here this morning and our professors who added a dimension to it—very thought provoking—for participating.

I thank all of you for coming. I'm told we have some food and drink afterwards.

**STATE BAR PRESIDENT EYNON:** I need to do one last bit of housekeeping. There is a reception, as you just said. We encourage everybody to attend.

We can't put on something like this without sponsors as well. I need to reflect this in the record, Jim. On the back of your program we've already, of course, thanked the Law School several times. Bingham McHale, Bose McKinney & Evans, Connor + Associates, of course, and Littler Mendelson are also our sponsors. We want to thank them, and I wanted that read into the record.

*(Applause)*

**DEAN ROBERTS:** I think we have a motion to adjourn.

*(At 4:00 p.m., Friday, September 14, 2007, the Conference on Relations Between Congress and the Federal Courts was adjourned.)*