

Challenges to Judicial Independence A Perspective from the Circuit

The Honorable Carolyn Dineen King, of the United States Court of Appeals for the Fifth Circuit, visited campus last year as the Law School's Hallows Judicial Fellow. The highlight of her visit was the annual Hallows Lecture, which was subsequently published in the Marquette Law Review and appears here as well.

Introduction by Dean Joseph D. Kearney

It is my privilege to welcome you to our annual E. Harold Hallows Lecture. This lecture series began in 1995, and we have had the good fortune more or less annually since then to be joined by a distinguished jurist who spends a day or two within the Law School community. This is our Hallows Judicial Fellow. Some of these judges we meet for the first time. Others are more known to us beforehand—already part of us, really. Within that latter category, I am very grateful that today we have with us two of our past Hallows Fellows. I would like to recognize them. Chief Justice Shirley Abrahamson of the Wisconsin Supreme Court delivered the Hallows Lecture in 2003, my first year as dean. She is a friend of the Law School as well as a friend of this year's Hallows Fellow. The other is Judge Diane Sykes, a Marquette lawyer (Class of 1984), who is a member of the United States Court of Appeals for the Seventh Circuit and who delivered the Hallows Lecture in 2006. Thank you to both Chief Justice Abrahamson and Judge Sykes for being with us today.

Permit me to tell you something about the individual in whose memory this lecture stands. E. Harold Hallows was a member of the Wisconsin Supreme Court from 1958 to 1974, spending the last 6 of those 16 years as Chief Justice. That is a long time on a common-law and constitutional court, and Justice Hallows not only witnessed but participated in—even helped to cause—significant changes in legal doctrine in this state. All of that might be reason enough to remember him. But, as many of you are aware, Justice Hallows was *Professor* Hallows at Marquette University Law School for 28 years before his appointment to the Wisconsin Supreme Court. A generation of students took Equity and Equity II from Professor Hallows, who found time for this undertaking even in the midst of his work as a lawyer in Milwaukee and his extensive service to court reorganization and law reform efforts.

This year's Hallows Lecturer is the Honorable Carolyn Dineen King. For the past 28 years, Judge King has served on the United States Court of Appeals for the Fifth Circuit, recently completing a seven-year term as Chief Judge of that court. Judge King is an alumna of Yale Law School and maintains her chambers in Houston.

and the Rule of Law: Courts

This is nonetheless sort of a homecoming for her, not so much in the sense of a past affiliation with Marquette as because she is, at least as I see it (and as she sees it), from Milwaukee; she attended St. Robert's School in Shorewood for eighth grade and, thereafter, Downer Seminary, one of the precursors to the University School of Milwaukee. Because Marquette Law School is Milwaukee's law school, no less than when that was our name (until 1908), this gives us something of a connection to Judge King. It became official when Judge King had the good judgment—I know that she agrees with me on the matter—to hire Annie Owens, a Marquette lawyer (Class of 2005), as her law clerk during 2005–2006. We are delighted that Annie, currently working at a Washington law firm before spending next year as a Bristow Fellow in the Office of the Solicitor General at the Department of Justice, has come back for this lecture. So, in light of these Milwaukee and Marquette connections, we regard Judge King as falling into the Abrahamson-Sykes category of already being part of us.

Of course, no connection to the Law School is sufficient to warrant an invitation to deliver the Hallows Lecture. One must also have something interesting—preferably even challenging—to say. I am optimistic that Judge King will meet this criterion as well. Please join me in welcoming our Hallows Judicial Fellow, the Honorable Carolyn Dineen King.



Hallows Lecture by Judge Carolyn Dineen King

Thank you, Dean Kearney. I am going to talk today of something about which I care very deeply.

The first half-dozen years of the twenty-first century have been characterized by steadily increasing concern on the part of judges, lawyers, and academicians about serious challenges to judicial independence that we face in this country. Many law reviews, periodicals, and newspapers have contained articles on the subject, and at least one recent television talk show featured

a segment on judicial independence. In September 2006, retired Supreme Court Justice Sandra Day O'Connor and Justice Stephen Breyer convened a conference in Washington, D.C. on the topic of "Fair and Independent Courts" attended by several Supreme Court Justices and many of the country's business leaders, representatives of the press, state and federal judges, lawyers, and academicians. While challenges to judicial independence have been with us since the



founding of the Republic, those that have produced the current ferment are viewed by some as particularly troubling because they may be doing lasting harm.

What I would like to do today is to look first at why judicial independence is critically important to our system of government. I will move on to describe specific challenges to judicial independence that we face in the federal court system. While my focus is on the federal system, similar challenges are faced in the state court systems as well, a point that came through loud and clear from comments made by distinguished state court judges and practitioners at the O'Connor–Breyer conference. Finally, I would like to pay particular attention to the significant differences between how those challenges play out at the Supreme Court level and at the level of the intermediate federal appellate courts.

To define the contours of judicial independence and to show why it is important in our system of government, some history is useful. I am not a constitutional historian. But among the background papers furnished to participants in the O'Connor–Breyer conference was an excellent paper by Professor Jack Rakove of Stanford University on the origins of judicial independence, and what follows borrows heavily from that paper and its source material.¹

The judiciary that the American colonists were familiar

with was the English judiciary. Before the eighteenth century, royal judges served at the pleasure of the crown and, as Professor Rakove describes it, “courts were often viewed more as active agents of royal power than as impartial institutions mediating between state and subject.”² By contrast, juries were viewed, at least by some political theorists, as potentially independent of the crown. The Act of Settlement of 1701 established that royal judges would serve during good behavior and not at the king’s pleasure, and was intended to secure for judges the same ability to act independently that juries were thought by some to possess.

But even after the Act of Settlement and the independence that it secured for individual judges, the English judiciary continued as a part of the executive, and the highest court of appeal was the House of Lords. Further, the British government did not extend the Act of Settlement to its colonies—one of the many bones of contention between the American colonies and the British government. Instead, the colonists continued to have judges who served at the pleasure of the crown, and, as a result, the colonists placed much faith in independent juries (who decided questions of law and fact) to resolve their legal problems.

After independence, the American states (unlike Great Britain) adopted written constitutions of government. These constitutions were greatly influenced by Baron Montesquieu’s 1748 work, *The Spirit of the Laws*, which set out, for the first time, a modern, tripartite theory of separation of powers in which the judiciary was to be a separate entity.³ Montesquieu also described as the very definition of tyranny the concentration of executive, legislative, and judicial power in the same hands.⁴ The constitutionalists of the late eighteenth century took these views to heart; for example, the 1780 Massachusetts Constitution, which was largely drafted by John Adams, provided that “the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.”⁵

In the years immediately after independence, the three branches of state governments reflected in these first constitutions were not initially viewed as coequal, regardless of how they were defined in the constitutions.⁶ Initially strengthened as a check on executive power, the legislative branch had the most power, and the judicial branch was the weakest of all. But as the state legislatures hastily began to legislate in order to fight a revolutionary war and to raise the money and armies necessary to do so, the results were sometimes extremely problematic and burdensome for the former colonists, and criticism of state lawmaking grew loud and frequent.⁷ Along with the criticism, however, came the recognition that the legislatures' primary role as a check on executive authority had been supplanted by their expanding responsibility for carrying out the lawmaking essential to the young nation. What was needed, no less than a check on executive power, was a check on legislative power.

James Madison, focusing on the want of "wisdom and steadiness" in legislation,⁸ saw the judiciary as having an important role in addressing both legislative and executive abuses of power. Madison identified judicial independence as central to this function, and, like the English, he defined the concept primarily in terms of tenure during good behavior, with "fixed" and "liberal" salaries important as well.⁹

Alexander Hamilton also recognized the importance of an independent judiciary as a bulwark against the encroachments of the other two branches. In *Federalist 78*, for example, he stressed that "though individual oppression may now and then proceed from the courts of justice, the general liberty of the people . . . can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments."¹⁰ Hamilton believed that complete independence is "peculiarly essential in a limited Constitution," where courts are the only mechanism by which the constitutional limitations placed on the legislature could be preserved.¹¹ Beyond these institutional dangers, he wrote that judicial independence protects against the additional threats that surges of public opinion pose to constitutional limitations and individual rights.¹² Like Madison, Hamilton emphasized that life tenure was indispensable for the judicial branch to

remain independent, thereby preserving the judicial check on these perils.¹³ And to limit "an arbitrary discretion in the courts" themselves—judges "making it up as they go along," in the words of Professor Rakove¹⁴—it was necessary to bind the courts, in the words again of Hamilton, "by strict rules and precedents."¹⁵

Although lifetime tenure and fixed salaries would help secure independence for the judiciary, more was required if the judiciary was to be effective in countering the weight of elected legislatures. The critical piece came in the form of a written constitution, to be drafted by a convention called for that purpose and submitted to the people for ratification. As Professor Rakove points out, a constitution developed by these methods "could then be regarded as legally superior to ordinary acts of government. And that in turn could enable independent judges to enforce constitutional rules and norms against the other branches of government."¹⁶ Relatedly, an emerging doctrine of judicial review was also percolating at the time of the Constitutional Convention. Among the comments of the Framers were brief indications that they understood the concept and that the decision to award judges tenure on good behavior was designed in part so that they could fulfill that duty.¹⁷

The judicial role was further solidified by the Convention's resolution of the critical question of how conflicts between national and state laws would be resolved. The answer, of course, was the Supremacy Clause, which made the Federal Constitution the supreme law of the land and obliged state judges to enforce it as well. In one fell swoop, the Constitution was established as fundamental law and the enforcement of the division of power between the national government and the states was made a judicial function.¹⁸ Madison took some comfort in the role that the Supreme Court would play as the tribunal which would ultimately decide these boundary disputes.¹⁹ But, he added: "The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality."²⁰ He clearly refers to the judicial independence that lifetime tenure and fixed salaries were designed to promote.²¹

The result of the Framers' efforts to establish an

independent judiciary is Article III, Section 1 of the Constitution. We are all familiar with it, but it bears repeating:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

To sum up, the Constitution provided for an independent judiciary, separate from the elected branches. Its function was to enforce the provisions of the Constitution and of what was likely to be a large body of federal law—to hold the elected branches true to the Constitution and federal law and to resolve disputes over the division of power between the federal and state governments. Tenure during good behavior and a salary that could not be diminished were the primary mechanisms designed to secure the independence of the judicial branch. The goal was judges who would not be subject to domination or manipulation by the elected branches or by the shifting passions of the people at large. And, as we have seen from Hamilton's writings, among others, the judges themselves were to be constrained by the very laws they were to enforce, constrained by "strict rules and precedents," in his words, with the goal of limiting "an arbitrary discretion in the courts."²²

In the words of a modern day Justice, Stephen Breyer, "judicial independence revolves around the theme of how to assure that judges decide according to the law, rather than according to their own whims or to the will of the political branches of government."²³ Professor Dennis Hutchinson of the University of Chicago has identified two premises from Breyer's succinct formula. "First, the judicial independence is not an end in itself but is an instrument in service of the rule of law. Second, . . . 'judges free from executive and legislative control will

be in a position to determine whether the assertion of power against the citizen is consistent with law."²⁴

Having described the origins and contours of judicial independence, I turn now to current challenges to judicial independence that are viewed by many as sufficiently serious as to threaten the judiciary's ability to function as intended by the Constitution. I look first at how the judiciary has fared with the President and with members of the legislative branch.

What we see is that the independence of the judiciary is being challenged by a large volume of sometimes vitriolic attacks being leveled at both the state and federal judiciaries. While attacks on the judiciary are nothing new, they are nonetheless disturbing when they reach the volume and pitch of those that we have witnessed in the last several years. These attacks emanate from the President himself, who with distressing frequency (particularly when an election is upon us) takes the podium to decry "activist judges" at the state and federal level who, in his view, are responsible for various decisions with which he and members of his political base disagree. The term "activist judges" has become, and is intended to be, a key rallying call to the political base, not only from the President but also from members of both houses of Congress and from the base itself.

The attacks on the judiciary are triggered most often by judicial decisions, such as the Schiavo case, the Ten Commandments cases, the Pledge of Allegiance case, and the eminent domain cases.²⁵ After the courts decided not to intervene in the Schiavo case, then House Majority Leader Tom DeLay warned that the judges would have to "answer for their behavior" in a court system "run amok."²⁶ Shortly after Judge Lefkow's husband and mother were murdered and the violence that occurred in a state courthouse in Georgia, Senator John Cornyn took to the Senate floor to suggest some vague connection between the deranged murderers responsible for "recent episodes of courthouse violence" and "judicial activism."²⁷ To his credit, he subsequently backed off of that. Although some have called for the impeachment of judges responsible for the controversial decisions, Representative James Sensenbrenner, then chair of the House Judiciary Committee, rejected the notion that Congress should

respond to cases such as the Schiavo matter by attempting to neuter the courts through the impeachment of judges. But even in rejecting impeachment, he warned ominously, “This does not mean that judges should not be punished in some capacity for behavior that does not rise to the level of impeachable conduct.”²⁸ He reserved the right to tinker with the courts’ jurisdiction, and he proposed the creation of an inspector general within the judiciary. Other congressmen have suggested that the way to rein in the courts is to starve them, raising the specter that constraints on the federal judiciary’s budget, beyond those already resulting from the escalating deficit, would be the payback for controversial decisions.

Judicial independence is undermined not only by these external attacks but also by the high degree of political partisanship and ideology that currently characterizes the process by which the President nominates and the Senate confirms federal judges. It should be said at the outset that, at least to some extent, this is nothing new. At several points in our history, presidents have scrutinized the ideological leanings of prospective Supreme Court nominees with the goal of nominating Justices with views compatible with the respective views or perceived needs of those presidents. President Franklin D. Roosevelt, for example, was particularly careful about the views of nominees to the Supreme Court and the intermediate federal appellate courts after the Court’s rulings in the early 1930s invalidating various pieces of New Deal legislation that the President considered crucial to the recovery of the nation from the Great Depression. The Senate has engaged in the same kind of scrutiny as a part of the confirmation process.

Let me be clear: there is nothing inappropriate with

political or partisan considerations factoring into the judicial appointment process. After all, the Framers vested the nomination and confirmation powers in the elected branches of government, and it is to be expected that the President and senators would seek judges whose judicial philosophies seem consistent with their own.

That said, the last 50 years or so, and the last 25 years in particular, have featured an ever-increasing and contentious focus in the nomination and confirmation process on whether candidates for the Supreme Court and the intermediate federal appellate courts are committed, either by reason of their background and experience or by reason of explicit or implicit commitments they have made as a part of that process, to particular positions on several politically salient issues including abortion, civil rights, and the rights of criminal defendants. The force of this change has been particularly felt by the intermediate

federal appellate courts, whose judges had been

selected under the more ideologically neutral system of patronage that generally guided appointments until the 1960s.²⁹ Before talking about the ramifications of the focus on political ideology for judicial independence and for the rule of law, I would like to talk about what has been afoot during the last half century that has played a role in the intense and widespread interest in the political ideology of judicial nominees.

Beginning in the early 1950s, decisions by the Supreme Court, under the leadership of Chief Justice Earl Warren, focused increasingly on the constitutional rights of individuals, as distinguished from property or business matters.³⁰ Perhaps the most famous is the 1954 decision in *Brown v. Board of Education*, which struck down the so-called “separate but equal” education of black citizens that prevailed in

What we see is that the independence of the judiciary is being challenged by a large volume of sometimes vitriolic attacks being leveled at both the state and federal judiciaries. While attacks on the judiciary are nothing new, they are nonetheless disturbing when they reach the volume and pitch of those that we have witnessed in the last several years.

Southern and adjoining states.³¹ *Brown* was only the first in a series of Supreme Court decisions directed at dismantling laws that discriminated against blacks in many aspects of their lives. During the 1960s, the Court broadened the protections of criminal defendants under the Fourth, Fifth, and Sixth Amendments to the Constitution. This is the era of the decisions that mandate the appointment of counsel for indigent defendants in criminal cases,³² that require warnings for suspects being interrogated designed to advise them of their constitutional rights,³³ and that require the exclusion from trial of illegally obtained evidence,³⁴ to name just a few.³⁵ During the 1970s, the Court recognized new rights for women under the Fourteenth Amendment, with the most controversial case being the 1973 decision of *Roe v. Wade*, in which the Court held that the Constitution protects a woman's right to choose abortion during the early stages of her pregnancy.³⁶

The beneficiaries of these decisions had been largely unable to obtain protection of these rights from the elected branches of government. With the advent of these decisions, the federal judiciary became the forum to which the disadvantaged (or those who perceived themselves to be disadvantaged) turned to vindicate their rights.³⁷ The Supreme Court led the way, but the lower federal courts were entrusted with fashioning remedies to enforce these rights.³⁸

Early successes in the federal courts attracted members for, and energized, interest groups that were advocates for the disadvantaged. The federal courts were seen by these groups as the place to achieve social change.³⁹ By the mid-1970s, conservative interest groups, also energized, stole a page from the book of the liberal interest groups and sought to enlist the aid of the federal courts to overturn or narrow the gains of the so-called liberal activists in the preceding 20 years.⁴⁰

Beginning in the 1960s, these policy-oriented issue activists started to ally themselves with the two major political parties: liberals allied themselves with the national Democratic Party and conservatives with the national Republican Party.⁴¹ With issue activists swelling the ranks of the two political parties, or at least providing votes for their respective candidates, and with the federal courts being seen by these groups

as a vital battleground, appointments to the Supreme Court and the intermediate federal appellate courts became a critical element of party policy. As Professor Stephen Burbank of the University of Pennsylvania Law School puts it, the courts came to be seen as fodder for electoral politics . . . [with the view] that it is appropriate to pursue chosen ends through the selection of judges who are committed or will commit in advance to pursue those ends on the bench. The impression sought to be created is that not only are courts part of the political system; they and the judges who make them up are part of ordinary politics.⁴²

Burbank's observation was recently confirmed by the Federalist Society's Executive Vice President, Leonard Leo, who said that, in the current environment, "a judicial confirmation process needs to resemble a political campaign."⁴³

With this historical backdrop, a significant goal of the appointment process for the Supreme Court and for the intermediate federal appellate courts has become the appointment of judges who could be relied upon to further the activists' policy agendas.⁴⁴ The reason for this seems to be that the leading political and issue activists in (or allied with) each party are the ones who, if satisfied with the party's or a candidate's position on critical issues, will mobilize the masses to turn out on election day; if dissatisfied, they and their followers will either stay home or, worse yet, actively campaign against the party or its candidate.⁴⁵

Particularly after the reported disappointment of Republican administrations with Justice Souter's perceived infidelity to the ideology of those administrations, reliability became vitally important. As Professor Burbank points out, the risk that a judge might be won over by the rule of law ideal or might experience a post-appointment "judicial preference change" has caused some presidents to seek protection by nominating individuals whose preferences seem to be "hard-wired."⁴⁶ For candidates whose views are less certain, the candidate might be "induced nonetheless to commit to a desired path

of judicial decision in advance.”⁴⁷

Another factor at work in the appointment process is the trend toward selecting nominees for the Supreme Court from the intermediate federal appellate courts. While this has the advantage for the selection process of providing a nominee’s track record and information about his temperament—and the advantage for the nominee of providing useful experience—it has the disadvantage of creating an incentive for decisions made with an eye to advancement.⁴⁸ As Professor Vicki Jackson of the Georgetown University Law Center describes it, “if lower court positions came to be viewed more as ‘stepping stones’ rather than ‘capstones,’ the temptation at the margin for self-interested decision making might increase, especially in an atmosphere in which confirmation battles focus more openly on ideology.”⁴⁹

A few years ago, I attended a symposium on judicial independence at Yale Law School.⁵⁰ After the speakers had made their presentations, comments from the floor were requested, and Judge Guido Calabresi of the Second Circuit, formerly the dean at Yale, popped up from the back row. He said that he had only been on the Second Circuit for a few years, but that it was long enough for him to conclude that the greatest threats to judicial independence were judges with ambition. He said that many such judges were real candidates for advancement only in their own minds.⁵¹ Nevertheless, a judge with ambition constantly has his eye on what the Administration or the Senate Judiciary Committee would think about a decision under consideration and how the decision would affect his chances for advancement. Some such judges go around the country making speeches to various interest groups, including well-known groups that seem to me to be increasingly akin to political parties or organizations, about their views on various hot-button issues. I recognize that judges have First Amendment rights, but some of the speeches that I have read seem designed to send

**[A] judge
with ambition
constantly has his eye
on what the Administration
or the Senate Judiciary
Committee would think about
a decision under consideration
and how the decision would
affect his chances
for advancement.**

signals or assurances about their views on issues that may well come before them, thereby enhancing their chances for promotion by the right president.

Several books and countless articles have been written on the political ideology that each of the presidents from Richard Nixon to George W. Bush has looked for in his nominees to the Supreme Court and the intermediate federal appellate courts and on the degree to which that political ideology served as a litmus test for nomination.⁵² In the time that I have today, I cannot do more than provide a few

brief generalizations on that subject, generalizations that will necessarily be of limited utility. Beginning with President Nixon, Republican presidents have promised to appoint only conservative judges—those who believe in “strict construction” of the Constitution.⁵³ Inherent in that promise is a goal to reverse or greatly narrow the policy gains liberals were perceived to have made in federal court litigation in the 1950s and 1960s, including gains in the areas of civil rights and the rights of criminal defendants. President Reagan also emphasized that his nominees must have a judicial philosophy “characterized by the highest regard for protecting the rights of law-abiding citizens” and by the “belief in the decentralization of the federal government and efforts to return decision making power to state and local elected officials.”⁵⁴ And, as one might expect in the post-*Roe v. Wade* era, President Reagan promised to work for the appointment of judges “at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.”⁵⁵

To achieve these ends, “[l]egislative, patronage, political, and policy considerations were systematically scrutinized for each judicial nomination to an extent never before seen.”⁵⁶ Under the direction of Reagan’s Attorney General Edwin Meese, lengthy, probing interviews became common between Justice Department and White House officials and prospective nominees with the goal of ascertaining in advance how the

nominees would rule on the political issues important to the administration.⁵⁷ Some nominees successfully resisted these efforts, but the risk was that too much resistance could prove fatal to the nominee.

The conservative political ideology sought by President Reagan has been sought with equal intensity by both Presidents Bush.⁵⁸ Their selection efforts have been aided by conservative interest groups such as the Federalist Society, which began to develop in the early 1980s. The groups have come to provide forums and opportunities for advancement for their members and valuable opportunities for Republican administrations to vet their judicial nominees.⁵⁹

The two Democratic administrations in the last thirty years have differed somewhat from the Republican administrations in the way that they attempted to satisfy party issue activists. Carter abandoned patronage concerns and created so-called merit screening panels to recommend qualified judicial nominees.⁶⁰ Primarily, though, President Carter sought to satisfy his liberal party base by appointing black and female judges in large numbers, at least as compared with the number of these judges appointed by prior presidents, and some merit screening panels were given goals to strive for.⁶¹ Additionally, President Carter ran on a platform that supported the decisions of the Warren Court, and the selection criteria he established included that a recommended nominee “possesses, and has demonstrated, a commitment to equal justice under law,” which some conservatives viewed as a euphemism for liberal ideology.⁶²

From my own experience, the man who is now my husband, Circuit Judge Thomas M. Reavley, and I were both identified by the merit screening panel charged with finding potential judges for

the western half of the old Fifth Circuit (which stretched from Florida to Texas). Neither of us was ever asked what our views were on issues important to President Carter’s supporters, although Judge Reavley’s progressive views on race issues were generally known because of his extensive public service. I am a fourth-generation Republican, and when I was approached by the merit screening panel to see if I was interested in applying for a circuit judgeship, I told the chairman about my Republican lineage. He responded that President Carter did not care what my politics were.

Like President Carter, President Clinton also sought to satisfy party activists primarily by diversifying the federal bench.⁶³ But he took a more moderate approach than had President Carter on some issues, including crime, and that approach was reflected in some of his nominations.⁶⁴ He also continued the Department of Justice/White House interview process for intermediate federal appellate court judges that began under President Reagan.⁶⁵ Overall, I think it is fair to say that both Presidents Carter and Clinton were careful not to appoint judges with political views on the key issues that would be objectionable to the Democratic Party’s liberal base.⁶⁶

As political factors have increasingly come to bear on a president’s judicial nomination decision, the trend has been mirrored in the Senate confirmation process, where interest groups have one last shot to derail an undesirable nominee or to save an embattled one. Though influential in the confirmation process for Supreme Court nominees since at least the 1960s, interest groups really began to focus on lower federal court confirmations in the 1980s.⁶⁷ One result has been the increased use and threat of obstructionist tactics by senators to block particular nominees or to influence the nomination process itself through compromises.⁶⁸ Another

As political factors have increasingly come to bear on a president’s judicial nomination decision, the trend has been mirrored in the Senate confirmation process, where interest groups have one last shot to derail an undesirable nominee or to save an embattled one.

consequence has been the pointed questioning during Senate confirmation hearings that often attempts to probe a controversial nominee's political leanings and the ways in which a nominee would decide particular issues.

I need to end this description of the ideological pressures that have become so prevalent in the judicial appointment and confirmation processes with one very important caveat. Whatever may have been the commitment of a president to his political base with respect to the political ideology of his nominees, not every judge appointed by that president has fit the description of what he was looking for; indeed, happily for the Republic, many have not.

It is clear to me that, in the last 50 years, we have come a long way from the goal of the Framers of a judiciary independent of the executive and legislative branches. In the words of Circuit Judge Diarmuid F. O'Scannlain of the Ninth Circuit (a very impressive judge, I might add),

By demanding to know in advance how a particular nominee will rule in a given kind of case, the political branches are exerting precisely the sort of direct control over the judiciary that Hamilton and the other Framers sought to avoid with the creation of a separate and distinct third branch.⁶⁹

But even without direct or indirect assurances as to how nominees would rule, a highly partisan or ideological judicial selection process conveys the notion to the electorate that judges are simply another breed of political agents, that judicial decisions should be in accord with political ideology, all of which tends to undermine public confidence in the legitimacy of the courts.⁷⁰ The loss of public confidence in the legitimacy of the courts—confidence that courts will decide impartially, in accordance with the rule of law—could, in turn, undermine compliance by the public with unpopular decisions.

Having described what I believe to be the causes of the politicization of the appointment process and how it has come to function, I would like to examine how the structure of lower court decision making combines with strong partisan or ideological views on the part of some of its judges to imperil the

fidelity of those judges' decisions to the rule of law. I will do that by contrasting the way in which the Supreme Court functions with the way in which a large intermediate federal appellate court functions.

The current Supreme Court hears approximately 80 fully briefed cases a year. All nine Justices hear and decide each case. Virtually all cases receive oral argument, at which questions can be explored with counsel and alternative outcomes and rationales pursued by the Justices themselves as well as by counsel. Every case receives a full opinion, and there are often concurring opinions and dissents. These opinions are circulated in draft form, with the Justices examining each critically and asking questions and making suggestions. While constitutional scholars and even the newspapers tell us that there are somewhat consistent voting patterns⁷¹ by some Justices in some types of cases coming before the Supreme Court, there is clearly no such thing as clique voting on the Supreme Court. Every vote is carefully considered; a Justice concurring in today's case may be dissenting in tomorrow's.

The result is that the record in the case, the relevant law, and the resulting opinions are thoroughly vetted by nine of the country's toughest critics. First and foremost, the Justices are accountable to each other for their work. Once the opinions are released, they are poured over by academics, journalists of every kind and stripe, lawyers, and the public at large. The Justices are thus held accountable for their work, indeed for their every word. As Chief Justice William Howard Taft remarked: "Nothing tends more to render judges careful in their decisions and anxiously solicitous to do exact justice than the consciousness that every act of theirs is to be subject to the intelligent scrutiny of their fellow men, and to their candid criticism."⁷²

Contrast this with the intermediate federal appellate courts. First, the workload is different in quantity and quality. Using the most recent year for which statistics are available, 2005, an intermediate federal appellate judge on average participated in the termination on the merits of 457 cases.⁷³ Using another measure of workload, such a judge authored 154 opinions and concurred in or dissented from 308 others, for a total of 462 cases that bore his name.⁷⁴ With the exception of a few cases

that are heard by the full en banc court, we sit in panels of three judges. Only 20 percent of the fully briefed cases in the Fifth Circuit, to give one example, are orally argued. As for differences in quality, most intermediate federal appellate court cases do not demand the kind of effort that most of the Supreme Court's cases require, and most would have only one outcome, no matter who appointed the panel members.

But the sheer volume of cases means that not every case gets the full attention of all three judges, let alone the full en banc court. Indeed, it would be an unusual case in which more than one judge on the panel reviewed the record, and not many cases benefit from an in-depth study of the applicable law by all three judges. This work pattern necessarily means that the level of interaction between the judges hearing a case is dramatically different than it is on the Supreme Court, and the level of functional accountability for his work of each judge to other judges is correspondingly different. As for external scrutiny, when our opinions are issued, most do not receive thoughtful review by anyone other than the parties. Some academics take an interest in some of our opinions, as do some journalists and bloggers. But on the whole, our work does not receive anything like the scrutiny that Supreme Court opinions receive.

This means that one or two of what Professor Burbank calls hard-wired judges, whether liberal or conservative, on a panel can produce a result that is not true to the rule of law, either because it is not faithful to the record in the case or because it does not fairly apply the existing law, without that fact being apparent to anyone other than the litigants. In high-volume courts, judges are often effectively forced to rely on "borrowed intelligence," i.e., to concur in opinions without a thorough grasp of the record or the governing law, simply because there are not enough hours in the day to acquire a thorough grasp of the record and law in the 450 cases a year that are disposed of on the merits. It is not a big step from there to clique voting, that is, voting with or at the direction of other like-minded judges simply because they share common ideological objectives, again without a good grasp of the record or governing law. After three



decades of judicial appointments based on partisan ideology, it should come as no surprise that clique voting happens, albeit infrequently, in more than one (but, I think, not many) of our intermediate federal appellate courts. Madison, who warned about the pernicious effects of factions in *Federalist 10*,⁷⁵ would be horrified to see them at work in some of our federal courts.

What does this mean for the rule of law, for the principle considered so important to the Framers that judges are to decide cases according to the law, rather than according to their own views of what the law should be or to the will of the political branches or the popular masses? The politicization of the appointment process, particularly for intermediate federal appellate judges, presents a grave danger to the rule of law. A judge who has been selected primarily for his perceived predisposition to decide cases in accordance with a particular political ideology may be consciously or subconsciously influenced to decide cases in accordance with that ideology, rather than in accordance with an impartial and open-minded assessment of what the law actually is. Professor Jackson, having identified that possibility, downplays its effect. She says: "As a normative matter, to think that judging is all about a judge's political or policy attitudes is to miss the constraining force of law."⁷⁶ But that view, of course, assumes the point at issue. The constraining force of law may be seriously weakened in the mind of a judge bent, either consciously or subconsciously, on implementing a particular political or ideological viewpoint. Such a judge, viewing a case through the prism of his ideology, may

misread or gloss over Supreme Court cases with holdings contrary or unhelpful to his ideological commitment. It bears remembering that it is Supreme Court cases that are viewed as the problem by many political or interest groups. Or such a judge may misread the record in the case in such a way as to distort the question presented or the evidence and thereby to facilitate the preferred outcome. The result is a decision that is not faithful to the rule of law. The overall result is some courts that are fragmented into ideological groups, having ceased to function as a court in many cases coming before them.

It is no answer to say that the Supreme Court is there as a constraining force to restore the rule of law to a case in which an appellate panel has not been faithful to the law. The judge bent on implementing his ideology knows that appellate review of his decision is highly unlikely. As Justice Scalia confirmed in his dissent in *Kyles v. Whitley*—which is one of the rare modern Supreme Court cases that solely involves the application of established law to the record—the Supreme Court is not a court of error, and “[t]he reality is that responsibility for factual accuracy, in capital cases as in other cases, rests elsewhere—with trial judges and juries, state appellate courts, and the lower federal courts.”⁷⁷

Instead, the Supreme Court generally takes cases where the law is unclear or in need of further development or where the circuits are in conflict. What this means is that the intermediate federal appellate courts are the courts of the last resort for all but the handful of cases that the Supreme Court will agree to hear. It is precisely that fact that has resulted in the politicization of the intermediate federal appellate court appointment process. Political and issue activists understand only too well that ideologically committed judges on these benches can make an enormous difference in the outcomes of hundreds of cases each year. Too, it would be a mistake to think that ideologically committed judges affect the outcomes only in cases that involve the so-called hot button issues: the civil rights of racial and ethnic minorities and women; abortion; the rights of criminal defendants; the death penalty; and states’ rights (or the proper balance of power between federal and state governments). My own observations suggest that these judges cast a much wider net. They have

strong views on plaintiffs’ jury verdicts, especially (but not only) large ones; on class actions; on a wide range of federal statutes imposing burdens on corporate defendants; on religion in schools and in public areas; and on and on.

If candidates for the presidency of both parties continue, as they have now for decades, to energize issue activists within or allied with their parties by promising the appointment of judges who will pursue the respective political and ideological agendas of those parties in their decisions, then judicial independence will continue to be severely threatened, and with it the rule of law in the United States. The *Washington Post*, in a 2005 editorial, captured the imminence of the threat:

The war [over Justice O’Connor’s successor] is about money and fundraising as much as it is about jurisprudence and the judicial function. It elevates partisanship and political rhetoric over any serious discussion of law. In the long run, the war over the courts—which teaches both judges and the public at large to view the courts simply as political institutions—threatens judicial independence and the integrity of American justice.⁷⁸

Aside from changes in the political process, positive change could also be effected within the court system itself if the Supreme Court were to function somewhat more often as a court of error, making clear that improper application of precedent will not be tolerated. While I recognize that significant time restrictions prevent the Court from doing so in the great majority of cases, even deciding a few such cases each term could provide a significant check on ideologically committed appellate judges, as no judge likes to be overruled by a critical opinion from the Supreme Court. As Justice Stevens recognized in his *Kyles* concurrence, “Sometimes the performance of an unpleasant duty conveys a message more significant than even the most penetrating legal analysis.”⁷⁹

The emphasis in the confirmation proceedings of Justice Alito on his fidelity to the rule of law during his tenure as an appellate judge was also a positive sign from two standpoints. First, it conveyed to the public following the confirmation proceedings the importance of

faithful adherence to the law by a judge, no matter what his political leanings were thought to be. Second, it just may have conveyed to judges aspiring to higher office the notion that faithfully adhering to the rule of law is an important qualification for promotion and, conversely, that there may be a price to be paid for failing to do so.

Perhaps the most positive development, at least as I see it, is the powerful message that Chief Justice John Roberts has sent about the approach that judges should follow in today's highly politicized environment. In a recent interview with Professor Jeffrey Rosen of George Washington University Law School that appeared in *The Atlantic Monthly*, Chief Justice Roberts reminded us that Chief Justice John Marshall's continuous effort to unify his Court, to urge his Court to speak with one voice, was based on the recognition that a court so unified fosters public respect for the legitimacy of the court as an impartial institution that rises above ideology.⁸⁰ Chief Justice Roberts also reported his firsthand observations

of how the D.C. Circuit countered the politicization of that court's appointment process by working to achieve consensus, by "function[ing] as a court," as he put it.⁸¹ From these models, Chief Justice Roberts observed that a successful judicial temperament is marked by "a willingness to step back from your own committed views of the correct jurisprudential approach and evaluate those views in terms of your role as a judge."⁸² By contrast, the "personalization of judicial politics,"⁸³ in which judges pursue their ideological agendas at the expense of a unified court, undermines the rule of law and may leave the public with the perception that judges are little more than agents of the political powers that put them in office.

It is not too late, as the Chief Justice suggested, for judges to follow Marshall's example. By "refocus[ing] on functioning as an institution," courts can rebuild the institutional legitimacy that has been diminished by the politicization characterizing the judicial appointment process for the past 30 years.⁸⁴ •

1. Jack N. Rakove, *The Original Justifications for Judicial Independence*, in FAIR AND INDEPENDENT COURTS: A CONFERENCE ON THE STATE OF THE JUDICIARY 43 (T. Alexander Aleinikoff et al. eds., 2006).

2. *Id.* at 45.

3. 1 BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 151 (Thomas Nugent trans., Colonial Press rev. ed. 1900) (1748).

4. *Id.* at 152.

5. MASS CONST., pt. 1, art. XXX.

6. Rakove, *supra* note 1, at 48.

7. *Id.* at 49.

8. Letter from James Madison to Caleb Wallace (Aug. 23, 1785), in 2 THE WRITINGS OF JAMES MADISON 166, 167 (Gaillard Hunt ed. 1901) (emphasis omitted).

9. *Id.* at 170.

10. THE FEDERALIST NO. 78, at 464–65 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

11. *Id.* at 465.

12. *Id.* at 468.

13. *Id.* at 468–70.

14. Rakove, *supra* note 1, at 54.

15. THE FEDERALIST NO. 78, *supra* note 10, at 470.

16. Rakove, *supra* note 1, at 50.

17. *Id.* at 50–51.

18. *Id.* at 52.

19. THE FEDERALIST NO. 39 (James Madison).

20. *Id.*

21. Rakove, *supra* note 1, at 52.

22. THE FEDERALIST NO. 78, *supra* note 10.

23. Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989, 989 (1996).

24. Dennis J. Hutchinson, *History of Attacks on Judicial Independence*, Presentation at the Workshop for Judges of the United

States Court of Appeals for the Fifth Circuit (October 6, 2005); see also Pamela S. Karlan, *Judicial Independences*, in FAIR AND INDEPENDENT COURTS, *supra* note 1, at 40 ("[J]udicial independence is not an end in itself, but is rather a means of ensuring freedom and the rule of law.").

25. See generally Carolyn Dineen King, *Current Challenges to the Federal Judiciary*, 66 LA. L. REV. 661, 665–66 (2006).

26. Editorial, *Hail of Criticism Batters Judges, Imperils Justice*, U.S.A. TODAY, April 12, 2005, at 12A.

27. *Angry at Rulings, Some Judge the Judges*, ABC News, May 1, 2005, <http://abcnews.go.com/Nightline/LegalCenter/story?id=1028391&page=1>.

28. *Clarity for the Judiciary*, WASH. POST, May 11, 2005, at A16.

29. NANCY SCHERER, *SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS* 13 (2005).

30. *Id.* at 13–14.

31. 347 U.S. 483 (1954).

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

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

34. *Mapp v. Ohio*, 367 U.S. 643 (1961).

35. See SCHERER, *supra* note 29, at 14.

36. *Roche v. Wade*, 410 U.S. 113 (1973); see also SCHERER, *supra* note 29, at 14.

37. SCHERER, *supra* note 29, at 15.

38. *Id.*

39. *Id.*

40. *Id.* at 16.

41. *Id.* at 13.

42. Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, in FAIR AND INDEPENDENT COURTS, *supra* note 1, at 190.

43. Robin Cook, *Confirmation of High Court Justices Akin to Political Campaign*, *Leo Says*, UVA LAWYER, Fall 2006, at 14. In his remarkably candid comments, Leo described the highly organized campaign to ensure

nomination and confirmation of people committed to conservative priorities. Among the “preemptive, rapidly reactive, and very strategic” tactics that he and other conservatives employed for the recent nominations of John Roberts and Samuel Alito were intensive research on the nominees, polling to determine how best to frame the message to be given to the public about each nominee, extensive media interaction to get that message out, and mobilization of grassroots conservative activists to contact senators identified as being “on the fence” about a particular nominee and to convey messages of support for that nominee. *Id.* at 14–15. Explaining the importance of a consistent, aggressive media strategy designed to define the nominee as quickly as possible, Leo remarked that “[y]ou can’t just assume that the nominee’s qualifications will by themselves stand up to attack.” *Id.* at 15.

44. SCHERER, *supra* note 29, at 23; Burbank, *supra* note 42, at 204.

45. SCHERER, *supra* note 29, at 22–23.

46. Burbank, *supra* note 42, at 204 (citing Theodore Ruger, *Justice Harry Blackmun and the Phenomenon of Judicial Preference Change*, 70 Mo. L. REV. 1209 (2005)).

47. *Id.* at 205.

48. See Karlan, *supra* note 24, at 29.

49. Vicki C. Jackson, *Packages of Judicial Independence:*

The Selection and Tenure of Article III Judges, in FAIR AND INDEPENDENT COURTS, *supra* note 1, at 73.

50. See generally King, *supra* note 25, at 668.

51. *Id.*

52. The party platforms for each election also provide some insight into the standards by which each respective president has chosen his judicial nominees. For example, the 2004 Republican Party Platform said:

In the federal courts, scores of judges with activist backgrounds in the hard-left now have lifetime tenure. Recent events have made it clear that these judges threaten America’s dearest institutions and our very way of life. In some states, activist judges are redefining the institution of marriage. The Pledge of Allegiance has already been invalidated by the courts once And while the vast majority of Americans support a ban on partial birth abortion, this brutal and violent practice will likely continue by judicial fiat. We believe that the self-proclaimed supremacy of these judicial activists is antithetical to the democratic ideals on which our nation was founded. President Bush has established a solid record of nominating only judges who have demonstrated respect for the Constitution and the democratic processes of our republic, and Republicans in the Senate have strongly supported those nominees.

It also stated:

We support the appointment of judges who respect traditional family values and the sanctity of innocent human life.

Republican Party Platform of 2004, <http://www.presidency.ucs.edu/showplatforms.php?plat index=R2004>.

The 1996 Democratic Party Platform discussed judicial appointments in conjunction with civil rights law and affirmative action:

Over the last four years, President Clinton and the Democrats have worked aggressively to enforce the letter and spirit of civil rights law. The President and Vice President remain committed to an Administration that looks like America, and we are proud of the Administration’s extraordinary judicial appointments—they are both more diverse and more qualified than any previous Administration. We know there is still more we can do to ensure equal opportunity for all Americans, so all people willing to work hard can build a strong future. President Clinton is leading the way to reform affirmative action so that it works, it is improved, and promotes opportunity, but does not accidentally hold others back in the process. Senator Dole has promised to end affirmative action. He’s wrong, and the President is right. When it comes to affirmative action, we should mend it, not end it.

Democratic Party Platform of 1996, <http://www.presidency.ucs.edu/showplatforms.php?plat index=D1996>.

The 1988 Republican Party Platform echoed the Republican platforms from 1980 and 1984, declaring:

We appointed judges who respect family rights, family values, and the rights of victims of crime.

. . . .

[W]e reaffirm our support for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.

Republican Party Platform of 1988, <http://www.presidency.ucs.edu/showplatforms.php?plat index=R1988>.

And in 1976, the Democratic Party Platform said:

All diplomats, federal judges and other major officials should be selected on a basis of qualifications. At all levels of government services, we will recruit, appoint and promote women and minorities.

Democratic Party Platform of 1976, <http://www.presidency.ucs.edu/showplatforms.php?plat index=D1976>.

53. See SCHERER, *supra* note 29, at 36; SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 198 (1997); Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871, 888 (2005).

54. SCHERER, *supra* note 29, at 52, 55–56.

55. See *id.* at 58; GOLDMAN, *supra* note 53, at 297.

56. GOLDMAN, *supra* note 53, at 292.

57. *Id.* at 301–05.

58. See generally Goldman, *supra* note 53, at 877–89.

59. See SCHERER, *supra* note 29, at 109–10, 124–25.

60. GOLDMAN, *supra* note 53, at 238.

61. *Id.* at 238–39, 242–43, 249; SCHERER, *supra* note 29, at 77–81.

62. Elliot E. Slotnick, *Prologue: Federal Judicial Selection in the New Millennium*, 36 U.C. DAVIS L. REV. 587, 591–92 (2003).

63. SCHERER, *supra* note 29, at 83–85, 105.

64. *Id.* at 73.

65. See generally Sheldon Goldman et al., *Clinton’s Judges: Summing up the Legacy*, 84 JUDICATURE 228, 229–30 (2001).

66. SCHERER, *supra* note 29, at 73.

67. *Id.* at 108–09.

68. *Id.* at 109, 151–57.

69. Diarmuid F. O’Scannlain, *Today’s Senate Confirmation Battles and the Role of the Federal Judiciary*, 27 HARV. J.L. & PUB. POL’Y 169, 174 (2003).

70. See Jackson, *supra* note 49, at 67; Burbank, *supra* note 42, at 195–96.

71. See, e.g., *The Supreme Court, 2005 Term: The Statistics*, 120 HARV. L. REV. 372 (2006).

72. Viet D. Dinh, *Threats to Judicial Independence, Real and Imagined*, in FAIR AND INDEPENDENT COURTS, *supra* note 1, at 15.

73. U.S. Judicial Case Load Profile (2005), <http://www.uscourts.gov/cgi-bin/cmsa2005.pl>.

74. *Id.*

75. THE FEDERALIST No. 10 (James Madison).

76. Jackson, *supra* note 49, at 71.

77. 514 U.S. 419, 458 (1995) (Scalia, J., dissenting).

78. Editorial, *Not a Campaign*, WASH. POST, July 3, 2005, at B6.

79. Kyles, 514 U.S. at 455 (Stevens, J., concurring).

80. Jeffrey Rosen, *Roberts’ Rules*, ATLANTIC MONTHLY, Jan./Feb. 2007, at 104, 105, 113.

81. *Id.* at 111.

82. *Id.* at 113.

83. *Id.* at 106.

84. *Id.* at 105.