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Paul D. Carrington
Duke University Law School

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ORIGINAL SIN AND JUDICIAL INDEPENDENCE

Paul D. Carrington*

January 19, 2008

A DEFINING CHALLENGE

The independence of the judiciary is an enduring and defining objective of the legal profession. Law depends on judges to observe and enforce it. To secure such virtuous judges, they must be protected from retaliation by those who disapprove their decisions and prevented from receiving rewards from those who benefit by them. Those having the greatest stake in shielding judges from intimidation or reward are the profession that shares their dependence on public acceptance and respect. And that task of protecting judicial independence stands today at the very top of the agenda of the American legal profession.[1]

But the integrity of law and legal institutions requires more than the protection of judges. It is equally dependent on their willingness and ability to maintain virtuous disinterest in their work.[2] Whether or not inherited from Adam,[3] the sin of judicial self-indulgence or self-celebration is a perpetual temptation. Judicial self-restraint is a perpetual challenge. And perfection is an unattainable goal. The primary constraint on the tendency toward that evil of those who sit in judgment on others is the moral constraint imposed by the professional

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* Professor of Law, Duke University. Thanks to Michael Schobel for research assistance.

[1] See CHARLES G. GEYH, WHEN CONGRESS AND COURTS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM (2006). Among many law journal symposia on the subject is *Fair and Independent Courts: A Conference on the State of the Judiciary*, 95 GEO L.J.897 (2007); J*udicial Independence and Democratic Accountability* 61-1 LAW AND CONTEMP. PROB. (1999); on antecedent works, see Amy B. Atchison, Laurence Tobe Liebert & Denise K. Russell, *Bibliography on Judicial Independence and Accountability,* 72 S. CAL. L. REV. 723 (1999).

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

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

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community to which they belong. The primary function of the judicial opinion is to manifest the virtue of disinterest to those required to accept a decision and to the lawyers to whom it is addressed.[4]

The disinterest of the judiciary has been made increasingly difficult in the 20th century by the movement away from formalism to the realism that commissions judges to pay heed to the social consequences of their judgments.[5] But the more heed judges are expected to pay to the social consequences of their decisions, the harder it is to lay aside their personal preferences or the interests of their friends and allies.

As virtue has become more difficult to practice, it has become more in need. The present and rising mistrust of the American judiciary is not a direct consequence of the change in legal philosophy, but there is an obvious connection. As judges have increasingly and openly presumed to shape our polity, citizens who disagree with their politics have felt increasingly justified in challenging their independence with threats to judges who make decisions deemed bad or to promise celebratory rewards to those who presume to change the social order in ways deemed to be beneficial.[6]

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[4] "The most vital ingredient, . . was "intellectual rectitude"; judges must "support their judgments with that degree of candor" that will provide " adequate disclosure of the real steps by which they have reached where they are. " Thomas Reed Powell, *Some Aspects of American Constitutional Law,* 53 HARV. L. REV. 529, 549-550 (1940); and see generally Michael Boudin, *Judge Henry Friendly and the Mirror of Constitutional Law,* 82 N. Y. U. L. REV. 975 (2007).

[5] On early perceptions of the role of the federal judiciary see JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 290 (1996) On its evolution, see Herbert Jacob, *The Courts as Political Agencies: An Historical Analysis*, 8 TUL. STUD. IN POL. SCI 9 (1962). ROBERTO UNGER, LAW IN MODERN SOCIETY 210 (1976) may overstate the problem thus:

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

[6] See Steven B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 GEO L. J. 909 (2007). As an admission that the problems I pose are problems for me, too, I confess that there are hours of the day and perhaps even months of the year that I would support the impeachment and removal of Justices who signed opinions arrogating to themselves all the great social problems of their day without concern for the lack of any pre-existing text. I would that Justices so arrogant might find some other employment, perhaps as monarchs or popes. But it is

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It is also increasingly difficult for citizen lawyers to maintain their own disinterest in judging judges. One form of the human weakness here designated as original sin is the inclination of citizen-lawyers to link their respect and support of judges to their own preferences regarding the outcomes of the cases and political issues they decide. But another is uncritical fidelity to the judiciary that withholds from judges any sense of moral accountability to their professional peers that might reinforce their capacity to know and restrain themselves. Judging judges wisely, like judging cases wisely, requires self-knowledge and self-discipline, and even moral courage, on the part of citizen-lawyers and their organizations.

Effective moral reinforcement of the virtue of disinterest by lawyers judging judges depends on the presence of a system of accountability to deter and punish judicial sins exhibiting disrespect for citizens or their rights. To sensitize lawyers to their duty to judge judges and to alert judges to the presence of a judgmental profession, laws are needed to govern judges and provide occasions for judging them. Such laws have been and are evolving,[7] but only belatedly in the federal system, and there remains no system of accountability for the misdeeds of Supreme Court Justices other than the impeachment process.

The purposes of this essay are to present the need for such a system and to suggest an appropriate response to that need. It aims to define a role for citizen-lawyers in advocating and protecting the independence of the federal judiciary who increasingly exercise political power but who are subject to no personal accountability whatever for the social and economic consequences of their decisions.[8] The more

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these sentiments that we must control in ourselves if we expect those who presume to act as Cardinals to do the same.

[7] A poignant account of the 1978 proceeding in California to judge its Supreme Court in a professionally responsible way is PREBLE STOLZ, JUDGING JUDGES: THE INVESTIGATION OF ROSE BIRD AND THE CALIFORNIA SUPREME COURT (1981). Many states have established similar procedures and institutions to make their highest judges aware of their accountability for their conduct.

[8] I have elsewhere joined others in questioning "life tenure." *See generally* Paul D. Carrington, *Checks and Balances: Congress and the Federal Courts*, *in* REFORMING THE COURT: TERM LIMITS FOR JUSTICES 137 (Roger C. Cramton & Paul D. Carrington eds., 2006) I am apologetic for directing my attention here solely to federal courts that generally receive so much more academic attention than do the state courts that decide many, many more cases. Our excuse for this misdirection is that it enables us to address a wider audience, but one less likely to be usefully

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we confer political power on our judges, the more important it is that there be a system of disinterested accountability to correct their non-political misdeeds. We need occasions to judge our highest judges' conduct to remind Justices of their mortal limitations, to remind the profession of its responsibility for addressing judicial sins, and to reassure the public that even Justices are accountable to law. It is not suggested that this reform alone will reverse the trend of mistrust that presently alarms many citizen-lawyers, but only that it would help.

THE FOUNDING VISION

The American War for Independence was initiated and led by a Continental Congress comprised in large part by lawyers presenting themselves as citizens practicing selfless civic virtue, i.e., as advocates for the long-term interest of those they purported to serve. Heartened by their shared sense of high purpose and professional commitment, Thomas Paine optimistically proclaimed their achievement: "Law is King!"[9] The revolutionary vision Paine thus expressed was that legal texts could and would express the intent of those governed so that disinterested judges could rule in their name as well as the name of Law, and thus would gain the acceptance and support of those whom they judged. The Declaration of Independence protested, among other grievances, the failure of the King to provide the colonials with an independent judiciary whom they could trust to respect their legal rights.[10] This failure they implicitly promised to correct.

But what is it that federal judges and Justices should be "independent" of other than a malevolent King? The Founders' answer to that question was never clearly stated and their obscure text and its intent remain factors in our 21st century discourse.

At least some Founders fully understood that the judicial independence on which the rule of law depends must derive from the moral courage and professional self-discipline of the judges enabling

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influenced by academic utterances. See Robert S. Thompson, *Comment on Professors Karlan's and Abrams' Structural Threats to Judicial Independence*, 72 S. CAL. L. REV. 559, 562-63 (1999).

[9] COMMON SENSE 29 (1776).

[10] "He has obstructed the Administration of Justice by reusing his Assent to Laws for establishing Judiciary Powers. He has made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries."

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them (if they can) to discount not only their own interests but those of their friends and political allies. George Wythe, the first American law professor, was for the Founders a premier example of the virtuous judge who could command respect on the regal scale that Thomas Paine had foretold.[11] Wythe was compared by classically minded Virginians to Aristides, "the Just."[12] It was said of him, and apparently never questioned, that "a dirty coin never reached the bottom of George Wythe's pocket."[13] While perhaps best remembered as the law teacher to Thomas Jefferson, John Marshall, and Henry Clay, he concluded his career as the Chancellor of Virginia where he was among the first judges ever to invalidate legislation as inconsistent with the higher law written as the constitution of a Commonwealth.[14] He courageously rendered that judgment solo, and notwithstanding that the law he invalidated had favored the interests of his friends and political allies in the revolutionary movement in opposition to those despised English against whom the revolution had been waged.

The revolutionary lawyers had sensed a lack of that sort of independence in the colonial judges who were perceived to be intimidated by the royal government. They had very often in mind the celebrated Edward Coke,[15] who had been dismissed by King James I for his stated disregard of royal preferences in the decision of cases brought before the king's courts.[16] The Glorious Revolution of 1688 had brought King William and Queen Mary to the throne as monarchs who agreed to disown the power over the judiciary exercised by King James.[17] Their monarchy submitted to the Act of Settlement of 1701

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[11] His biographies are IMOGENE E. BROWN, AMERICAN ARISTIDES: A BIOGRAPHY OF GEORGE WYTHE (1981); WILLIAM CLARKIN, SERENE PATRIOT: A LIFE OF GEORGE WYTHE (1970); Robert Kirtland, *George Wythe* in 24 AMERICAN NATIONAL BIOGRAPHY 92 (John A. Garraty & Mark C. Carnes eds., 1999); ALONZO T. DILLL, GEORGE WYTHE, TEACHER OF LIBERTY (1979); E. LEE SHEPARD, GEORGE WYTHE IN LEGAL EDUCATION IN VIRGINIA 1779-1979 (W. Bryson ed., 1979); ROBERT BEVIE KIRTLAND, GEORGE WYTHE: LAWYER, REVOLUTIONARY, JUDGE (1982).

[12] I. BROWN, note 11, at 35.

[13] Id

[14] *Page v. Pendleton,* WYTHE'S REP. 127, invalidating a law of the Commonwealth purporting to extinguish debts owed to English creditors.

[15] On his celebrity status, see ALLEN D. BOYER, SIR EDWARD COKE AND THE ELIZABETHAN AGE (2003); CATHERINE DRINKER BOWEN, THE LION AND THE THRONE (1956).

[16] The story of his dismissal is told by BOWEN, *supra* note 15, at 370–90.

[17] For a full account of the event, see EVELINE CRUICKSHANKS, THE GLORIOUS REVOLUTION (BRITISH HISTORY IN PERSPECTIVE) (2000).

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declaring that their judges would serve for the period of their "good behavior" and be removable only by *address* of Parliament.[18]

Founders were equally familiar with the experience of Francis Bacon whose term as Chancellor of England was brought to an early end in 1621 when he confessed to a committee of Parliament and then to a committee of the House of Lords that he had received financial assistance from claimants whose claims he had upheld.[19] They were not unfamiliar with the wisdom that power corrupts and knew that corruption takes diverse forms. But without pausing during a time of war to formulate a plan for addressing the issues presented by Coke and Bacon, the Founders writing constitutions for new American states[20] drew from the Act of Settlement the term, "good behavior" as the standard for the removal of a misbehaving judge. The Founders also used the term in Article III of the federal Constitution.

That term "good behavior" had been in common usage in England at the time of the Act of Settlement[21] but Article III of the Constitution, unlike the Act of Settlement, provides for *impeachment* in lieu of parliamentary *address* as the action to be taken by the legislature to remove a judge. *Address* may reasonably be taken to impose less disapproval and humiliation on the addressee than does the term impeachment. But Article III does not specify standards of the "good behavior" that would immunize a judge from impeachment and removal from office or distinguish the standard for removal by impeachment from the standard for removal by address.

It is only in Article II that the Constitution specifies "high crimes and misdemeanors" as the standard to be applied in a proceeding to impeach and remove an officer of the executive branch. A question

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[18] "[J]udges commissions [shall] be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them;. . . ." Act of Settlement of 1701, 12 & 13 William 3, ch. 2, 3 (Eng.). Edward Coke had earlier stated his view regarding behavior justifying removal of a judge: abuse of office, nonuse of office, and refusal to perform duties. *Henry v. Barkley,* 79 Eng. Rep. 1223, 1224 (K.B. 1596).

[19] It is now contended that Bacon was innocent. NIEVES MATHEWS, FRANCIS BACON: THE HISTORY OF A CHARACTER ASSASSINATION (1996).

[20] The Constitution of Virginia, June 29, 1776.

[21] For an examination of the use of the term in 18th century England and in the colonies, see Saikrishna Prakash & Steven D. Smith, *How to Remove A Federal Judge,* 116 YALE L.J. 72, 88-128 (2006).

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never resolved is whether the Article II standard applies to the impeachment of an Article III judge, or, if so, what might constitute a misdemeanor for the purpose of removing one who holds office for "good behavior." There are clear differences between a judge and an executive officer that might seem to call for a difference in the standard to be applied by Congress when it considers its responsibility for removing an officer of an "equal branch" of government. Officers of the executive branch governed by Article II are subject to a measure of accountability to the electorate, whereas Article III judges are not. An ill-behaved President will meet his doom on election day, whereas an ill-behaved federal judge will not. And, moreover, for that reason officers of the executive branch cannot be expected to maintain the disinterest required of the judge, but must be expected to respond to diverse influences that are certain to taint the purity of their motives in performing public service. The Founders may for these reasons have wisely intended to hold judges to a higher measure of accountability for official behavior that is not good even if it is not a high crime.

Article III of the Constitution also fails to speak explicitly to the possibility of age or term limits imposed by law. It is widely assumed that such limits are not within the power of Congress. But merely assuring judges of "life tenure" like that of royalty, if the Constitution did that, hardly assured their fidelity to law anymore than it assured the king's fidelity to law. The fidelity of judges requires strong self-restraint, a morality that can erode over long years of tenure, especially if not reinforced by a moral climate maintained by the profession of which they are a part.

And judges who lack "life tenure" may nevertheless be seen like Wythe to practice courageous fidelity to law to gain the respect of citizen-lawyers and hence of the public they serve. Thomas Cooley was a notable example. He was elected in 1865 as the Republican candidate for the Supreme Court of Michigan.[22] One of the first opinions he wrote for his court cost several of his fellow Republicans the offices that they thought they had won. Specifically, Cooley led the court in holding that the provision of the state constitution limiting the right to vote to *residents* of the state invalidated the law enacted by the legislature to enable Union soldiers on duty in the Confederacy to vote by mail.[23] Regretfully, he explained that to depart from the plain

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[22] For an account of his chief justiceship, see PAUL D. CARRINGTON, STEWARDS OF DENIOCRACY 55-68 (1999).

[23] *People v. Blodgett*, 13 MICH. 163 (1865).

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meaning of the words of the constitution "would loosen the anchor of our safety."[24] His decision won the admiration of citizens of diverse politics as a signal of their court's integrity.[25]

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

But, still, power does corrupt. At some point on the variable scale of temptation a judge's professional self-discipline fades. The Founders' vision imposes on the Congress a duty to join in stripping judicial power from those who have succumbed to temptation or are unable to perform their job. As Lord Coke himself asserted, when it is clear that judges are not performing their offices or are using them for their own purposes, it is time that they be replaced.[26] And it is inevitably a task for the citizen-lawyer and the legal profession not only to support and defend judges whose conduct in office is within the limits of normal and expected human failings, but also to share responsibility when the time has come to punish or remove one who openly abuses or neglects the office.

Alas, original sin infects the decisions of groups as well as individuals. Like college fraternities or sororities, or alumni groups, professions and subsets of professions are given to group advancement even if it is sometimes at cost to the larger sets of which they are parts, such as the public interest. To avoid betrayal of larger

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[24] Id. at 173.

[25] He was nevertheless defeated in his campaign for re-election in 1885 as a result of a Democratic landslide. For an account of that event, see George Edwards, *Why Justice Cooley Left the Bench: A Missing Page of History*, 33 WAYNE L. REV. 1563 (1987).

[26] See note 18.

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public interests, citizen-lawyers, and even federal judges,[27] need a healthy sense of self-mistrust and skepticism about their professional ideology, a sense that cautions against the advancement of the legal profession at the expense of the public that we are licensed to serve.

THE FEDERALISTS' "ARK OF SAFETY"

Members of the founding generation very soon encountered the difficulties of judging the judges they had appointed for the period of their "good behavior." Notwithstanding the composition of the Continental Congress and the Constitutional Convention, there was in the late 18th century a shortage of Americans who were "learned in the law." Many colonials trained in law had been loyalists and had fled the Revolution.[28] Those who remained were men of strong and conflicting political views. Although Tocqueville would within a few decades designate them as an American aristocracy of sorts,[29] their profession was not at all times highly regarded by other citizens.

Notwithstanding disclaimers by The Federalist that the courts were the "least dangerous branch of the new government,[30] it was soon widely recognized that American courts and the legal profession were, in the Founding scheme, political institutions and not merely concerned with the correct enforcement of pre-existing legal rights.[31] The New Hampshire judiciary serves as a striking example of ubiquitous mistrust.

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[27] A reflection on the tendency of federal judges collectively to share at times the human failing leading to self-aggrandizement, see William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest Group Perspective,* 13 J. LAW & ECON. 875 (1975)

[28] MAXWELL BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY 1776-1875 at 139 (1976) (noting that one-fourth of colonial lawyers fled in the Tory exodus).

[29] 1 DEMOCRACY IN AMERICA 297-306 (Henry Reeves trans. Undated).

[30] No. 78. (Alexander Hamilton).

[31] An eloquent statement of the problem published in 1848 is that of Frederick Grimké, a Justice of the Ohio Supreme Court. CONSIDERATIONS UPON THE NATURE AND TENDENCY OF FREE INSTITUTIONS 355, 361 (2d ed. 1968): "If it is not wise to confer a permanent tenure of office upon the executive and legislative," he concluded, "it should not be conferred upon the judiciary; and the more so, because the legislative functions which the last perform is a fact entirely hidden from the great majority of the community. . . . The term of judicial office should therefore be "long enough to enable the public to make a fair trial of the ability and moral qualities of the incumbent; and not so long as to prevent a removal in a reasonable time if he is deficient in either."

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Some of that state's judges made no pretense of being trained as lawyers. John Dudley, a farmer, was elected to the state's Supreme Court and served from 1785 to 1797. He urged jurors to disregard the talk of lawyers; "be just and fear not" was his instruction. As far as the law was concerned, he said, "It is our business to do justice between the parties, not by any quirks of the law out of Coke or Blackstone, books that I never read and never will, but by common sense and common honesty as between man and man."[32] In a famous charge to a jury, Dudley said:

> Gentlemen, you have heard what has been said in this case by the lawyers, the rascals! They talk of law. Why gentlemen, it is not the law we want, but justice. They would govern us by the common law of England. Common sense is a much safer guide. . . . A clear head and an honest heart are worth more than all the law of the lawyers.[33]

There was nothing in the text of the Constitution to prevent the appointment of Justice Dudley to the federal bench or to the Supreme Court. Could it have been viewed as sufficiently short of "good behavior" for a federal judge to give such an instruction to a jury that he might be punished or removed from office in compliance with the text of Article III? Plainly in Justice Dudley's court, Law was not King. A judge, or a Justice, sitting in a court of law who demonstrably and often disregards controlling legal texts in this way should be chastised. And those who ought say so are citizen-lawyers who lead their profession and whose political preferences might have been advanced by such judicial misconduct. But it has seldom happened.

The federal courts authorized by the Constitutional Convention in Philadelphia were intended in part to correct the indifference to law observable in the courts of some states.[34] But as David Currie described, the federal courts established by the Judiciary Act of 1789[35]

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[32] 2 ANTON-HERMANN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 42-43 (1965).

[33] Quoted in WILLIAM PLUMER, LIFE OF WILLIAM PLUMER 154 (1857) and in MAXWELL BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY 57 (1976). Justice Dudley's jurisprudence had an English ancestry in the utterances of the Levellers. *See* CHRISTOPHER HILL, THE INTELLECTUAL ORIGINS OF THE ENGLISH REVOLUTION REVISITED 230–32 (1997).

[34] FEDERALIST 78 (Hamilton).

[35] 1 Stat. 73.

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soon became what he regarded as "the most endangered branch."[36] This is so because some of the Federalist judges also manifested a disregard for law, if less openly than Justice Dudley.

The structure of the original federal judiciary is pertinent. The Act of 1789 established the Supreme Court as a body of six Justices.[37] A district court was established for each of the thirteen states and one judgeship was created for each.[38] Those courts were authorized to hear and decide admiralty cases, minor criminal cases, and a few other matters.[39] Three circuit courts, each serving multiple states, were created to exercise appellate jurisdiction over the district courts and original jurisdiction in civil diversity cases, major criminal cases, and those in which the United States was a party.[40] Each circuit court was to be staffed by two of the six Justices and one of the district judges from within the circuit; Justices were thus required to be itinerant in a time when their travel was by horse, wagon, or sailing vessel.[41] Surely a motive of this scheme was to reduce the risk of self-advancing, lawless decisions in trial courts by submitting cases to three judges, not one. The full Supreme Court was to hear appeals from Circuit Court decisions only in those civil cases where the amount in controversy exceeded two thousand dollars and from decisions of highest state courts in cases raising federal questions. [42]

The people to be governed had scant personal contact with this federal judiciary. All early federal courts had very short dockets.[43] Few

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[36] DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIAN PERIOD, 1801-1829 at 11-38 (1997).

[37] Section 1.

[38] Section 2.

[39] Section 9.

[40] Section 6.

[41] Section 4.

[42] Section 13.

[43] During its first three years, the Supreme Court did not decide a single case. The Court decided only about 50 cases during its first decade. ROBERT A. CARP & RONALD STIDHAM, THE FEDERAL COURTS 6–7 (4th ed. 2001). Richard Posner, in THE FEDERAL COURTS: CRISIS AND REFORM, noted that there is not reliable data on docket size prior to 1904 (p. 59). FELIX FRANKFURTER & JAMES LANDIS THE BUSINESS OF THE SUPREME COURT 12-15, N. 35 (1928)cite President Jefferson's estimate of the total business of the circuit courts from their creation to the close of 1801 as 8358 Causes Instituted and 1629 Causes Depending.

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citizens of moderate means found occasion to invoke either the diversity or admiralty jurisdictions. And there were very few federal criminal laws to be enforced. But their enforcement often resulted from politically heated matters.

Treason was forbidden by the Constitution,[44] reflecting the Founders' concern about the loyalty of a diverse and disconnected citizenship. That concern was soon validated when citizens in the part of North Carolina that became the state of Tennessee declared the independence of their state of Franklin and sought the protection of the King of Spain.[45] The leader of that effort would not only escape prosecution but would be elected the first Governor of Tennessee.[46]

Also among the early treason prosecutions were those resulting from the Whiskey Rebellion of 1791-94.[47] That insurrection was conducted by farmers in several states who protested a federal tax on the sale of their one marketable product.[48] The rebellion was most bitter in western Pennsylvania, where it was suppressed by an army led by the President and the Secretary of the Treasury, Alexander Hamilton. Two participants found to have been violent were convicted of treason, but they were pardoned by President Washington.

In 1794, Congress was concerned about citizens embarking on private invasions of Florida and Louisiana and enacted a presidential proclamation as the Neutrality Act. That Act prohibited citizens from "invading or plundering the territories of a nation at peace with the United States.[49] That prohibition was frequently violated. William

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[44] Art. III, defines treason against the United States to consist only in levying war against them, or in adhering to their enemies, giving them aid or comfort. U.S. Const. art. III, § 3, cl. 1. This offence is punished with death. Article III also provides that "no person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court." *Id.*

[45] ROBERT E. CORLEW, TENNESSEE: A SHORT HISTORY 79 (1981)

[46] MARY FRENCH CALDWELL, TENNESSEE: THE DANGEROUS EXAMPLE 181-182 (1974).

[47] See JOHN CARROLL ELLIOTT & ELLEN GALE HAMMETT, CHARGED WITH TREASON, JURY VERDICT: NOT GUILTY (1986)

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

[49] JAMES ROGER SHARP, POLITICS IN THE EARLY REPUBLIC 107 (1993)

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Blount, a Democratic Republican was one of the first senators sent in 1796 to represent the new state of Tennessee. Within a year, he was impeached by Federalist adversaries for actively inciting Creek and Cherokee Indians to aid the British in conquering the Spanish territory of West Florida in alleged violation of the 1794 Act. Blount was expelled by a 25-1 vote of the Senate,[50] but before the impeachment was resolved, he fled to Tennessee.[51] He went on to preside over Tennessee's legislature, and was never prosecuted. Neither was Alexander Hamilton, who was in 1800 openly planning a seizure of New Orleans that was not approved by the Adams administration.[52]

Meanwhile, in 1793, Congress responded to the Justices' complaints about the burdens of "circuit riding" resulting from their duty to attend proceedings in distant courts. It halved the burden, not by appointing more judges to handle the small caseload, but by reducing the number of Justices expected to sit on the circuit courts from two to one, with the consequence that circuit courts were two-judge courts with the itinerant Justice presiding, and Justices' travel was reduced by half.[53] The district judge sitting with the Justice had a modest role unless the sitting Justice chose to defer to his colleague.

In 1794, it was recognized that John Sullivan, the first judge appointed to the federal district court in New Hampshire by President Washington, who had twice served as governor of that state, was insane or at least too alcoholic to attend court.[54] To correct this unfortunate situation, Congress took the questionable step of transferring all the jurisdiction of his District Court to the Circuit Court for his region.[55] It was not deemed necessary or appropriate to remove Judge Sullivan and he remained until his death a year later on the federal payroll as a judge of a court lacking jurisdiction.

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[50] See BUCKNER F. MELTON, JR. THE FIRST IMPEACHMENT: THE CONSTITUTION'S FRAMERS AND THE CASE OF SENATOR WILLIAM BLOUNT 125 (1998).

[51] *Id.* at 127.

[52] ROGER G. KENNEDY, BURR, HAMILTON AND JEFFERSON: A STUDY IN CHARACTER 136-38 (1999).

[53] Act of March 2, 1793, 1 Stat. 333.

[54] Id. Section 3.

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

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Upon the death of Judge Sullivan, Congress re-established the jurisdiction of the district court for New Hampshire,[56] and the position was taken by John Pickering, a former member of the Constitutional Convention and at the time Chief Justice of the state and thus a colleague of Judge Dudley.[57] But at the time of his appointment to the federal bench, efforts had been mounted by New Hampshire lawyers to remove Judge Pickering (but not Judge Dudley) from his office on the state court for the same reason of his insanity, a condition that may again have been associated with alcoholism or perhaps with superannuation.[58] An attempt to remove him from office had failed by one vote in the New Hampshire House of Representatives.[59] This cause for concern about his work habits as his state's Chief Justice was laid aside in the belief that he could bear the very light workload of the federal district court. Thus, he was appointed by President Washington to a federal judgeship in order to relieve the New Hampshire bar and legislature of a problem.

A similar event marked the career of Samuel Chase. While he had been representing Maryland in the Continental Congress during the Revolution, it was revealed that he had compromised military secrets to gain personal emolument in the flour market.[60] He was on that account deprived of his role in that congress. In 1788, after the war, Chase was despite that misdeed appointed to head Maryland's criminal court in Baltimore.[61] But in 1794, he was indicted by a Maryland grand jury for abusing his judicial authority.[62] Alexander Hamilton said of him at the time that he had "the peculiar privilege of being universally despised."[63] But his indictment never came to trial. Instead, he was appointed by

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[56] Act of April 3, 1794, 2 Stat. 353 § 3.

[57] CURRIE, note 55, at 200 n.207.

[58] See 1 HENRY ADAMS, THE FORMATIVE YEARS: A HISTORY OF THE UNITED DURING THE ADMINISTRATIONS OF JEFFERSON AND MADISON 193 (Herbert Agar ed., 1948).

[59] RICHARD ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 70 (1971).

[60] JAMES HAW, STORMY PATRIOT: THE LIFE OF SAMUEL CHASE 105-108 (1980). The person who first revealed his misdeeds to the public was Publius, the pen name of Alexander Hamilton. RON CHERNOW , ALEXANDER HAMILTON 118 (2004).

[61] HAW, *supra* note 60, at 162.

[62] Id. 173

[63] CHERNOW, note 60, at 118.

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President Washington to the Supreme Court of the United States.[64] Quite possibly the appointment of Chase was made, like that of Pickering, at the request of local lawyers who perceived that he would do less harm, at least to themselves and to the people of Maryland, if serving on a distant multi-judge federal court where he might be less free to indulge inappropriate impulses.

For a time the behaviors of both Judge Pickering and Justice Chase gave rise to no serious complaints. But Chase's self-control dissolved when he conducted trials of defendants accused of holding and expressing political views contrary to his own.[65] The potential role of federal judges as Federalist political partisans was exposed for all to see.

In 1798, the Federalist Congress, anticipating war with France, had enacted four laws designated as the Alien and Sedition Acts.[66] And in 1799, concerned about citizens negotiating private trade relationships with France, it prohibited negotiations with other nations on behalf of the United States without authorization.[67] Chase and many of his fellow Federalists were members of what they deemed to be a deservedly ruling class and many were strongly reacting against the class struggle in France. The Sedition Act proscribed, among other misdeeds, speech disrespectful of themselves as public officeholders, but not speech disrespectful of the Vice President, who happened not to be a Federalist.

Chase thus presided over the case of Thomas Cooper, an English immigrant charged with criminal sedition.[68] Cooper was eminent both as a physician and lawyer, and a sometime journalist in Pennsylvania.[69] He was a supporter of the presidential candidacy of Jefferson and had indeed published an unflattering account of

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[64] HAW, *supra* note 60, at 176; CURRIE, note 36, at 32.

[65] HAW, *supra* note 60, at 191–208.

[66] The Naturalization Act of June 18 would be repealed in 1802. The Alien Friends Act of June 25 expired after two years in force. The Alien Enemies Act of July 6 remains in force. 50 U.S.C. §§ 51-54. The Sedition Act of July 14 expired on March 3, 1801.

[67] The Logan Act (Jan. 30, 1799), 1 stat. 613, 18 U.S.C. § 953.

[68] DUMAS MALONE, THE PUBLIC LIFE OF THOMAS COOPER 1783-1839 at 121-30 (1926).

[69] Id. passim.

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President Adams.[70] But Justice Chase went beyond the contentions of the prosecutor, and in open disregard of common law standards,[71] informed the jury that Cooper was guilty. He then, with the assent of the subordinate district judge, sentenced Cooper to six months in jail, a judgment subject to no appellate review.[72]

Chase then presided over the trial of John Fries, who was indicted for *treason* for impeding the efforts of federal tax collectors.[73] The tax that Fries and others protested was the Direct House Tax on houses, land and slaves enacted to pay for national defense against a French invasion anticipated by Federalist Francophobes.[74] The tax was imposed in 1798 along with the Alien and Sedition Acts. It was known as a "window tax" because homeowners in non-slave states had their tax liability measured by the size of their windows. It was also known as a "hot water tax" because that is what women poured from their second floor windows on tax collectors appearing at their front doors.[75]

Fries had in 1794 participated in the Whiskey Rebellion. In 1799, he led a group of 60 armed men who threatened the task collectors seeking to enforce the Direct House Tax. He even imprisoned three revenuers overnight and deprived them of their papers. When some of his men were in turn imprisoned, Fries led an armed posse to the United States Marshal sufficiently intimidating to secure their release.[76] President Adams ordered the Army to take control and in 1799 it succeeded in arresting Fries, along with forty others. He was charged

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[70] Id. at 105, 119–21.

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

[72] MALONE, *supra* note 68, at 126–27.

[73] R. ELLIS, *supra* note 59, at 77-78. FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 637–41 (1849)

[74] Direct Tax Act of 1798 1 Stat. 597.

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

[76] Id at 140.

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with treason. He admitted the factual allegations, but denied disloyalty to the United States. Justice Chase refused to allow his lawyers to argue to the jury that his actions were not *treason*. The lawyers accordingly withdrew from the case. Their client was then convicted and Chase sentenced him to death. But Fries was soon pardoned by President Adams.[77]

In another 1800 case, James Callendar was charged with sedition for his denunciation of President Adams. Justice Chase refused to excuse a juror who acknowledged his certainty of Callendar's guilt. And for no stated or defensible reason he refused to allow the defendant's principal witness, John Taylor of Caroline, a notable Jeffersonian, to testify. In Callendar's case, Chase was also reported to have interrupted, badgered, and insulted defense counsel.[78]

For these and perhaps other reasons, Chase was indeed much despised. He was disowned by President Adams when he campaigned for re-election in 1800.[79] There was never an effort mounted by the Federalists in Congress or by their Attorney General to remove Justice Chase or to constrain him from his extreme partisan misconduct and brutality.

Meanwhile, also in 1800, Judge Pickering again became a frequent absentee from work. His clerk would report to the Circuit Court that he had become insane and was not performing his job.

Perhaps partly on account of these events, Jefferson's party[80] swept the Federalists out of most elective offices, except for those serving New England. But the outgoing Federalist Congress and President Adams addressed the reality of their defeat in the first weeks of 1801 with the "Midnight Judges' Act."[81] That Act added sixteen

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[77] Richard Ellis, *The Impeachment of Samuel Chase,* in AMERICAN POLITICAL TRIALS 57-78 (Michael R. Belknap ed., 1981). But see Stewart Jay, *The Rehabilitation of Samuel Chase*, 41 BUFF. L. REV. 273 (1993).

[78] WHARTON, note 73, at 688-721; JAMES M. SMITH, FREEDOM'S FETTERS 334-58 (1956).

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

[80] Then known as the Democratic Republican Party.

[81] Act of February 13, 1801, 2 Stat. 89, 97 § 25. District courts had by then been established in North Carolina, Rhode Island, and Vermont, so that there were to

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circuit judgeships (one for each state); these judges would sit on the circuit courts whose jurisdictions were extended to the constitutional limit. It also reduced the number of Justices from six to five. But before that provision took effect, a sixth Justice, John Marshall, was appointed and confirmed, apparently in the hope that this overstaffing would prevent the incoming President from making any appointment to the Court. And all the new judgeships were quickly filled with loyal Federalists who had lost their offices in the election.

Federalist Governeur Morris explained that his party was "about to experience a heavy gale of adverse wind." Therefore, he asked, "can they be blamed for casting many anchors to hold their ship through the storm?"[82] Martin Van Buren, no admirer of Morris, later referred to this event as the creation of an "ark of safety" for Federalist politicians.[83] Felix Frankfurter and James Landis explained that the 1801 Act "combined thoughtful concern for the federal judiciary with selfish concern for the Federalist party."[84] Perhaps what Frankfurter and Landis had in mind as an expression of "thoughtful concern for the federal judiciary" were its provisions putting an end to "circuit riding" by Justices and empowering the new circuit judges to disqualify a district judge from deciding cases if they found him to be incapacitated.[85] This power was promptly exercised by the Supreme Court to move Judge Pickering into a state of compensated retirement. [86]

Given the partisan self-serving effect of the Midnight Judges Act, there can be little surprise that it was repealed by the new Democratic Republican Congress.[87] The repeal drew criticism from St. John Tucker, the first scholar of constitutional law and a supporter of President Jefferson. He argued that it was unconstitutional to terminate sixteen well-behaved district judges by simply abolishing their judgeships. The Act, he said, threatened "the fundamental pillars of free governments," by threatening the job security and independence of

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be sixteen district courts each served by two judges. For further analysis and comment, see Kathryn Turner, *The Midnight Judges,* 109 U. PA. L. REV. 494 (1960).

[82] Quoted in R. ELLIS, note 59, at 15.

[83] INQUIRY INTO THE ORIGIN AND COURSE OF POLITICAL PARTIES IN THE UNITED STATES 278 (1867).

[84] THE BUSINESS OF THE SUPREME COURT 25. (1928).

[85] Act of February 13, 1801, 2 Stat. 89, 90 § 7.

[86] R. ELLIS, note 59, at 70.

[87] Act of March 8, 1802, 2 Stat. 132.

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judges.[88] His argument was considered and rejected by both Houses of Congress and by the President. Tucker's assessment was in recent times somewhat diffidently endorsed by David Currie who concluded that "finding places for a few extra judges may be a fair price to pay for judicial independence."[89]

Had the Act of 1801 creating those offices been less audacious and had there been any need for the additional judges, the arguments of Tucker and of Currie might have greater force.[90] But they disregard the larger context of the Midnight Judges Act, which was an insult to the integrity of the nascent federal judiciary by using it for the personal advantage of the judges they appointed. That legislation, it is important to emphasize, was enacted after the Federalists had already lost the election. Its manifest purpose had nothing to do with the duty of Congress and the President to maintain an independent judiciary or secure "faithful enforcement" of law, but was quite the opposite in its self-dealing intent to capture offices in the federal judiciary for rejected officeholders. To preserve the judicial offices newly created under those prevailing circumstances would have served as an acceptance of the right of "lame-duck" Congressmen to use the judicial branch, not only as a place of employment of defeated politicians, but for the purely political aim of prolonging their unwelcome political influence. It might on the contrary be better argued that citizen lawyers defending the integrity of the judiciary should have insisted, as many did, on the repeal of the unsightly Act of 1801.

Although that repeal had the perhaps unintended effect of restoring Judge Pickering to the bench,[91] no judge was punished for making a decision disapproved by Congress. Tucker in his 1803 treatise, notwithstanding his previously expressed concern about the Act of 1802, celebrated the federal Constitution as the first to recognize "the absolute independence of the judiciary" as "one of the fundamental

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[88] 1 WILLIAM BLACKSTONE, COMMENTARY ON ENGLISH LAW: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND THE LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 360-61 (St. George Tucker ed., 1803).

[89] CURRIE, note 36, at 23.

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

[91] 3 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 165 (1929).

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principles of government."[92] He optimistically explained that "the violence and malignity of party spirit, as well in the legislature, as in the executive, requires not less the intervention of a calm, temperate, upright, and independent judiciary."[93] The 1802 Act was rightly presented as legislation to reinstate the integrity of the federal judiciary. And no Congress has since been tempted to enact corrupt legislation of the 1801 sort. If one should do so, it would be a task for citizen lawyers and their bar organizations to secure its repeal.[94]

REMOVING A DISABLED JUDGE: THE PICKERING CASE

But then in 1803, animated in part by what they, with some justification, regarded as overbearing conduct by the remaining Federalist judges who were proclaimed to be "partial, vindictive, and cruel,"[95] the Jefferson administration set about the task of removing what some reckoned to be an excess of Federalists remaining among the federal judiciary whose behavior was less than good.[96]

For a first step, President Jefferson recommended Judge Pickering's removal. Congress impeached him of drunkenness and unlawful rulings in an admiralty case involving the ship *Eliza,* which he had ordered the marshal to release to its owners, who were fellow Federalists, despite the non-payment of duties it owed. When the United States Attorney pointed out that Judge Pickering had not yet heard the government's witnesses, he was said drunkenly to have

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[92] VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS 290 (1999) (a belated republication of Tucker's major additions to the 1803 edition of supplement to his Americanized edition of *Blackstone's Commentaries on the Laws of England)*.

[93] Id. 291.

[94] The Commerce Court was established in 1910 at the behest of President Taft; its jurisdiction was to review decisions of the Interstate Commerce Commission. It was "launched in unfavorable winds and encountered a heavy sea"; it was seen as a target and prisoner of interest groups. Taft vetoed its abolition in 1912, but it was abolished in 1913, after he left office. Four members of the court were retained as full-time, sometimes itinerant members of the federal judiciary. The story is fully told by FRANKFURTER & LANDIS, note 43, at 153-74. And see Philip B. Kurland, *The Constitution and The Tenure of Judges: Some Notes from History*, 36 U. CHI. L REV. 665, 683-686 (1969).

[95] 1 CHARLES WARREN, THE HISTORY OF THE SUPREME COURT 191 (1928); see generally id. 187-230.

[96] R. Ellis, note 59, at 69-122; see also GEORGE L. HASKINS & HERBERT A. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-1815 at 205-45 (1981).

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affirmed that "You may bring forty thousand and they will not alter the decree."[97] He was also accused of committing unspecified "high crimes and misdemeanors." It was contended in his defense that his insanity disabled him from entertaining the criminal intent required to find him guilty of a "high crime or misdemeanor". In response to that defense, the Senate agreed to strike the reference to "high crimes", but found him guilty on all counts of behavior that was not sufficiently good, and he was accordingly removed from office.

The Federalists had contended that those words requiring proof of "high crimes or misdemeanors" appearing in Article II and applicable to impeachment and removal of executive officers were by implication applicable as well to Judge Pickering. The Senate's ruling that an Article III judge can be removed for misconduct not rising to "high crimes or misdemeanors," whatever those words might be taken to mean, stands out. But no federal judge has since been impeached and removed who was not found guilty of criminal misconduct.

No worthy government then or now should require its citizens to submit their disputes to drunken Judge Pickering for resolution. He had to go. If impeachment and removal by Congress were the only available means of assuring the rights of citizens to have their cases competently decided, then such a judge should indeed be impeached. Notwithstanding the enduring practice of referring to Article III judges as officers enjoying "life tenure," they do not have a right to remain in offices whose duties they cannot or will not perform.

But it was clearly unnecessary to impeach and remove Judge Pickering. The repealed Act of 1801 had provided an unobjectionable means for putting him on the shelf on account of his disability and there was no sufficient reason to repeal that provision, or at least to devise an alternative method of achieving the humane result of retiring disabled judges gently, in a non-punitive manner. On that point, David Currie is surely right that the cost of Judge Pickering's salary is a price worth paying to avoid a use of the impeachment power to remove a judge whose misconduct is not sinister.

The failure of Congress in 1802 to address the problem of superannuated and otherwise non-performing judges imposed burdens and risk of injustice on randomly selected litigants and lawyers. Given the system of judicial selection established by Article III, it was

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[97] A full account is Lynn Tucker, *The Impeachment of John Pickering*, 54 AM. HIST. REV. 485 (1949).

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inevitable and obvious that some judges would like Pickering hold their offices long after they were intellectually and emotionally fit to perform the work. And in 1802 it was already surely known that power tends to corrupt and reinforce the selfish or brutal instincts of those on whom it is conferred. But oversight of judicial conduct was left to the appellate process conducted by the itinerant Justices of the Supreme Court. And not until 1889 was there even a right of appeal in a criminal case.[98] For a century, federal cases were decided by judges who were often unaccountable for their rulings, and some of whom were seriously disabled and unfit. It was fortunate that few rights of most citizens in the 19th century depended on their enforcement by federal judges.

Congress did at last get around to creating the courts of appeals in 1891.[99] That legislation was celebrated by its Congressional proponent, as a law ending "the kingly power" of federal judges.[100] Until that enactment, the only court reviewing judgments in civil cases was the Supreme Court with an ever-extending docket. It had required a half-century of agitation by able and committed citizen-lawyers such as Senator Evarts and Congressman Culberson to induce Congress to establish a right of appeal in criminal cases and a forum capable of reviewing judgments in civil cases.[101]

Even in the 20th century with appellate courts in place to oversee the exercise of "kingly power", judicial behavior exhibiting decrepitude or emotional disorders could be observed. And even plain disregard of the applicable law occurred from time to time. The recent biography of Judge Willis Ritter of the Utah District Court[102] tells a tale less extraordinary than many might choose to believe. Ritter was appointed in 1950. He was the son of a Utah coal miner. He had been a law professor at the University Utah and held a high position in the regional Office of Price Administration during World War II. He was

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[98] Act of February 6, 1889, 25 Stat. 655 provided for appeals, but only in capital cases. See FRANKFURTER & LANDIS, *supra* note 43, 109-113.

[99] Act of March 3, 1891, 26 Stat. 826

[100] He acknowledged "a supreme desire to witness during . . . my time in Congress the overthrow and destruction of the kingly power" of the federal judges." 21 Cong Rec. 3403 (1890). "Kingly power" was in part a feature of the solitude of the single district judge presiding over his district. See PETER GRAHAM FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 3-17 (1973).

[101] The story is told in FRANKFURTER & LANDIS, *supra* note 43, at 56-102.

[102] His biography is PATRICIA F. COWLEY & PARKER M. NIELSEN, THUNDER OVER ZION: THE LIFE AND TIMES OF CHIEF JUDGE WILLIS RITTER (2006).

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recommended by former law teachers at Chicago and Harvard. He had prospered in private practice as a tax and estates lawyer. He had been political patron and advisor to the senior United States Senator, a New Deal Democrat, almost entitling him to judicial office by the standards of the day. His appointment by President Truman was indirectly opposed by the Mormon hierarchy and the junior Republican Senator who launched a serious campaign against his nomination, based centrally on allegations that over the years he had expressed disapproval of the Constitution and even expressed Communist sentiments. It was also proclaimed that he had not been faithful to his wife, and that he had sometimes manifested a bad temper.

Unfortunately, the latter point got lost. He was confirmed, but his ill temper was seemingly magnified by the experience. He proved over the years to be an increasingly abusive judge, insulting and degrading to court staff and the post office staff with which he shared a building, and brutal in his dealings with lawyers and litigants, and even with fellow federal judges. In 1954, Judge Ritter's critics secured the appointment of a second district judge notwithstanding the fact that he had kept a clean docket. His deep resentment of the "little helper" resulted for many years in efforts to minimize the role of his colleague through the exercise of his powers as chief judge.

Judge Ritter's personal life also withered. He was brutal in his disapproval of a daughter's marriage and to respond to his wife's chastisement on his behavior on that occasion, he brought a "girl friend" to the family farm. The loyal wife did not divorce him but did thereafter leave him to live alone. First, he lived in the local University Club, but he was expelled for drunkenly punching the crippled manager for refusing to serve him another drink after hours. He thereafter lived in a hotel room across the street from the courthouse. He was given to public urination and womanizing.

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

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David Currie[103] and Martin Redish[104] have in recent years drawn from the two centuries of Congressional self-restraint in the exercise of the impeachment power the principle that the Article II standard (high crimes or misdemeanors) applies to Article III impeachments. Saikrishna Prakash and Steven Smith have lately taken a contrary view and reassured Congress that not only may it remove a judge whose behavior they deem to be less than good, but they may even provide a procedure other than impeachment to exercise that responsibility.[105]

Congress had in due course taken an intermediate position by gradually delegating increasing power to the federal judiciary to govern itself with respect to misconduct by its officers. Reform began in 1922 when Congress created the Judicial Conference of the United States,[106] a body that gradually came to exercise substantial power over judicial matters.[107] It has emerged as the institution responsible for disabled or unfit judges. On its advice, other reforms followed.

The problem posed by decrepitude was at last eased in 1939 by entitling judges or Justices who certified their disability to retire from regular active duty, provided their certification was signed by their chief judge or Justice.[108] But those who have served for less than ten years (such as Judge Pickering) are retired at half pay. Then in 1954, judges and Justices were given encouragement to withdraw from full duty after an extensive period of service. The required period of service varies in length according to their age at the time of appointment; but they may at the end of that time either retire at full pay, or take *senior status*.[109] Those on senior status remain on call by their chief judge and generally

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[103] Supra note 36, at 23-38. Currie, like many other constitutional scholars over the ensuing centuries, contrasts two choices: use the Article II standard to limit the impeachment power or allow Congress to remove a judge if it disagrees with his decisions. He does not consider other alternative meanings of the "good behavior" standard.

[104] *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis* 72 S. CAL. L. REV. 673 (1999);

[105] Op. cit. note 21.

[106] Act of September 14, 1922, 42 Stat. 837.

[107] For a brief account of its development, see Paul D. Carrington, *Checks and Balances: Congress and the Federal Courts,* in REFORMING THE COURT, note 7, at 137, 147-152.

[108] See Albert Yoon, *As You Like It: Senior Federal Judges and the Political Economy of Judicial Tenure*, 2 JOURNAL OF EMPIRICAL LEGAL STUDIES 514 (2005).

[109] 28 U.S.C. § 371.

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bear lighter caseloads. Most federal judges take senior status when they become eligible because of the attraction of a lighter caseload.[110] As a consequence of these reforms, decrepit judges in the district courts or courts of appeal are seldom a concern. But these reforms did not address the problem posed by Judge Ritter, who would never have voluntarily surrendered power.

In 1948, at the suggestion of the Judicial Conference, Congress delegated some of its responsibility for the oversight of courts to a Judicial Council in each circuit.[111] The 1948 statute provided that "[e]ach judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district courts shall promptly carry into effect all orders of the judicial council." Plainly, the district courts were to be subject to restraints in the exercise of their "kingly power," but it was not clear what those restraints might be.

In 1965, Alfred Murrah, the Chief Judge of the Tenth Circuit and *ex officio* chair of its judicial council invoked the 1948 law to relieve district judge Stephen Chandler of his docket.[112] The case for doing so was strong although the contrary tradition imposed on Judge Murrah a substantial burden of moral courage. In 1962, Chandler had testified before a United States Senate subcommittee that he was afraid of being poisoned, that his telephone was tapped and that his fellow judges sometimes privately cursed him. Twice he had been removed from hearing lawsuits because of allegations of personal interest or bias and prejudice. He had barred the United States Attorney in Oklahoma City and five other Oklahoma City lawyers from practicing in federal court; each of those rulings had been strongly overruled as by the court of appeals. Also, he had in 1965 been indicted by an Oklahoma grand jury on the charge of conspiring to have his private road paved by the county. Murrah's Tenth Circuit Judicial Council found that he was "unable or unwilling to discharge efficiently the duties of his office."[113]

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[110] "Most pension-eligible judges choose to remain on the bench as senior judges. . . . Since 1984, over 80 percent of all federal judges have taken senior status." Yoon, note 108.

[111] Act of June 25, 1948, 62 Stat. 902, 28 U.S.C. 332.

[112] See Robert R. Davis, *The Chandler Incident and Problems of Judicial Removal,* 19 STAN. L. REV. 448 (1967).

[113] *U.S. Judge Stephen Chandler Often Feuded with His Colleagues,* NEW YORK TIMES, April 29, 1989.

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Judge Chandler petitioned the Supreme Court for an order restoring his docket. His petition was denied on the ground that the Council's order was interlocutory and not ripe for review.[114] But Justices Black and Douglas dissented, urging that "[w]e should stop in its infancy, before it has any growth at all, this idea that the United States district judges can be made accountable for their efficiency or lack of it to the judges just over them in the federal judicial system."[115]

Shortly after the Supreme Court's disposition, the indictment of Judge Chandler was dismissed and the matter of his incapacity was settled by assigning him a modest caseload. Had he been convicted,[116] he would have been subject to impeachment and removal even under the Article II standard applicable to executive branch officers.

Parties and lawyers appearing before a judge such as Judge Ritter or Judge Chandler were right to feel ill-served by the United States. But it could be the United States as a party that is ill-served, as it often was when it was a United States Attorney who was the object of judicial abuse. The example of the restraint imposed on Judge Chandler inspired the Department of Justice to seek an order of the Judicial Council of the Tenth Circuit to exclude Judge Ritter in Utah from deciding civil or criminal cases in which the United States was a party.[117] Judge Ritter died before that issue was resolved.

In 1980, Congress at last explicitly empowered the regional Judicial Councils to follow the example set by Chief Judge Murrah, rejecting the advice offered in the dissent of Justices Black and Douglas.[118] The 1980 Act was challenged by Judge John H. McBryde of the Northern District of Texas. McBryde had been the subject of an

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[114] *Chandler v. Judicial Council of Tenth Circuit of U.S.*, 382 U.S. 1003 (1966).

[115] Id. at 1004.

[116] At least three circuits have held that prosecution of judges can precede impeachment. See *United States v. Claiborne,* 727 F.2d 842, 845 (9th Cir. 1984); *United States v. Hastings*, 681 F.2d 706, 710 (11th Cir. 1982); *United States v. Isaacs,* 493 F.2d 1124, 1140-44 (7th Cir. 1974). And see Black and Douglas, JJ dissenting in *Chandler,* note 101 at 140 ("If they break a law, they can be prosecuted. If they become corrupt or sit in cases in which they have a personal or family stake, they can be impeached by Congress.")

[117] COWLEY & NIELSEN, note 102, at 288;

[118] The Judicial Conduct and Disability Act of Oct. 15, 1980, 94 Stat. 2036. For comment, see Symposium, *Disciplining the Federal Judiciary*, 142 U. PA. L. REV 1 (1993); Steven Burbank, *Politics and Progress in Implementing the Federal Judicial Discipline Act*, 71 JUDICATURE 13 (1987).

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extended investigation by a committee of the Fifth Circuit's Council. In a 159-page report, it recorded his frequent brutality in his treatment of parties, witnesses, lawyers, and fellow judges,[119] and it recommended that he be publicly reprimanded and asked to retire. The Council reprimanded him and relieved him of his docket for one year. Its order was approved by the Committee of the Judicial Conference, the institution that he then sued in the District of Columbia; The Court of Appeals there upheld the law and the power conferred on the Judicial Council,[120] observing that the constitutional assurances of job security for judges were intended only to protect again political intervention by the other branches of the federal government and were not intended to immunize judges from judgments by other members of the judicial branch.[121] The Supreme Court denied certiorari.[122]

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[119] The example chosen by the Court of Appeals arose in 1992:

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

McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of the Judicial Conf. of the United States, 264 F.3d 52, 67 (D.C. Cir. 2001).

[120] Id.

[121] Id at 66: "Thus it seems natural to read Hamilton as seeing the guarantees of life tenure and undiminished compensation, and the limited means for deny-ing a judge their protection, simply as assuring independence for the judiciary from the other branches. The Supreme Court has considered the same passage as Judge McBryde invokes and so interpreted it: 'In our constitutional system, impeachment was designed to be the only check on the Judicial branch by the Legislature.' *Nixon v. United States*, 506 U.S. 224, 235 (1993)."

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In 2002, the 1980 statute was elaborated as a whole chapter of Title 28 of the United States Code.[123] The scheme now in place explicitly authorizes the Circuit Judicial Councils to entertain citizens' grievances against federal judges regarding their conduct, but only apart from the substance of any rulings they might make. Councils are empowered to investigate and conduct hearings in confidence, and to reimburse a judge for his expenses if he is found to be unjustly accused of misdeeds. A Council may order "that, on a temporary basis for a time certain, no further cases be assigned to the judge whose conduct is the subject of a complaint."[124] Or it may censure a judge either privately or by a public pronouncement.[125] Or it may certify his disability or request his voluntary retirement.[126] The rulings of a Judicial Council may be appealed by the judge or by a complaining party to a standing committee of the national Judicial Conference established to review the decisions of judicial councils.[127] A matter may also be referred to the Judicial Conference for consideration of a reference to the House of Representatives for possible impeachment and removal. But all such actions are explicitly non-reviewable by conventional civil proceedings.

The statute also provides that if a judge convicted of a felony under state or federal law, the Judicial Conference may directly refer the matter to Congress for consideration of possible impeachment and removal. But it also empowers the Judicial Conference to "make its own determination" that impeachment and removal are appropriate and to refer its decision to Congress. Without endorsing its every word, this author praises this legislation, and asks why it took over two centuries to establish such a scheme. A shortage of citizen lawyers advocating the public interest is the most apparent explanation. It proved to be

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[122] 537 U.S. 821 (2002)

[123] Judicial Improvements Act of 2002, 28 U.S.C. §§ 351–364.

[124] This is the sanction imposed by the Fifth Circuit on Judge Samuel Kent of Galveston on a finding that he had sexually harassed a staff member. Pamela A. MacLean, *An Ill-Timed Judicial Reprimand,* NATIONAL LAW JOURNAL, Oct. 8, 2007 at 5. His future may remain in doubt. A call for his impeachment, based on diverse other complaints, is Dolph Tillotson, Judge Kent Should Resign, Galveston Daily News, October 10, 2007.

[125] The Ninth Circuit has announced that it will post its disciplinary orders on line. Pamela A. MacLean, *9th Circuit Will Post Disciplinary Orders,* NATIONAL LAW JOURNAL, January 7, 2008 at 23.

[126] 28 U.S.C. § 354.

[127] 28 U.S.C. §357.

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crucial to have the federal judiciary itself, in the form of the Judicial Conference, take up the cause. But at last there is now a process providing occasions for the exercise of disinterested assessment of judicial conduct, and it is a task for citizen lawyer to employ that process and provide the disinterested assessment needed.

Had such a process been established in 1802 when the Judiciary Act of 1801 was repealed, it would over the intervening years have spared many litigants, lawyers, and lesser officers of court of many abuses and injustices at the hands of federal judges in conditions of physical or psychiatric decline. Not only would it have enabled the removal of the worst judges, but it would have deterred brutal conduct that was the product of judicial arrogance, a quality that seems more likely to evolve in the minds of judges assured of absolute job security and vast powers over others.

THE IMPEACHMENT OF JUSTICE CHASE: ARE JUSTICES DIFFERENT?

In addition to removing Judge Pickering, the Democratic-Republican Congress also considered the removal of Justice Chase. They did not proceed against him at once, although he had plainly abused his power in Alien and Sedition Act cases.

But in 1803, Justice Chase, in a charge to a grand jury, proclaimed that the Judiciary Act of 1802 was unconstitutional and went on to denounce President Jefferson as the author of mobocracy that would destroy peace, order, freedom, and property. This last was more than the Democratic-Republicans could stand.[128] With the concurrence of the President, Congressman John Randolph initiated articles of impeachment enumerating many very unjust procedural rulings made by Chase. His impeachment was approved by the House.

The trial of Chase in the Senate was conducted in 1805, with "lame duck" Vice President Burr presiding. Not only was Burr's relationship to President Jefferson poisonous,[129] but he had in 1804

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[128] R. ELLIS, note 59, at 80.

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

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killed Alexander Hamilton in a duel and been indicted for murder,[130] an event further magnifying both his celebrity and his disrepute on all sides.[131] Over a thousand spectators attended the trial in the new Capitol. The defense argued that mere error in the making of procedural rulings, however grave, is not an impeachable offense. Among the witnesses for Chase was Chief Justice John Marshall, but his testimony on Chase's character was diffident.[132] It is consistent with his conduct that he privately shared the view that Chase should have been removed.

There was reason to remove Chase, as William Rehnquist has acknowledged.[133] His assault on the President alone disabled him from thereafter sitting on matters in which the actions of the President might be brought into question. There was no longer any possibility that his judicial decisions on grave public matters could reasonably be supposed by citizens to be the product of disinterested assessment of the facts and law at hand. His conduct at the Callendar trial was an outrage even by the rustic standards of the day.[134]

Randolph was rated by those present to be a disastrously bad advocate for Chase's removal. Among other failings, he lost his notes and made a pitifully bad closing argument.[135] Because a sufficient few of the Democratic Republican Senators were angered by Randolph or perceived the removal of a Federalist Justice to be a threat to the integrity of the judiciary,[136] the Senate could not muster the two-thirds

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[130] See id. 20-47.

[131] Some regarded him as disqualified to sit on the matter because of his poisonous relations with both the President and many Federalists. CHERNOW, note 60, at 719.

[132] 3 BEVERIDGE, note 71, at 1192-1196.

[133] GRAND INQUESTS: THE IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 73 (1992).

[134] RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 224-251 (1973).

[135] "[M]uch distortion of face and contortion of body, tears, groans, and sobs, and occasional pauses for recollection, and continual complaints of having lost his notes." 1 MEMOIRS OF JOHN QUINCY ADAMS: COMPRISING PORTIONS OF HIS DIARY FROM 1795 TO 1848 359 (Charles F. Adams ed., 1874); See also HENRY ADAMS, JOHN RANDOLPH 100-101 (1882).

[136] Some may perhaps have agreed with David Currie that it is better to let a hundred guilty people go free than to convict one innocent judge. Note 36, at 37. And see Kurland, note 94, at 665-66.

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votes to remove Chase.[137] It is reported that all those present were sorry that the proceeding had been commenced.[138] So Chase remained on the Court with Marshall.[139]

President Jefferson, furious at Randolph over other matters as well as his ineffectiveness in presenting the case against Chase,[140] and perhaps seeking to reduce partisan frictions, did not lend aid. He later declared that the impeachment process was a "farce" requiring a constitutional amendment to correct the error in our Constitution, which makes any branch independent of the nation."[141] The failure to remove Justice Chase may be viewed as a serious failure of the duty of Congress to act as a "check and balance" to correct gross abuse of power by a Justice. Prakash and Smith are surely correct that the mere failure to exercise the power to impeach and remove Chase does not alone tell us the meaning of the Constitutional text.[142]

Perhaps the failure to remove Chase was a consequence of the extreme hostility dividing the parties in the Senate and evoking a hope of resolution by a few Democratic Republican Senators, as well as the gross mismanagement of the case by Senator Randolph. It might indeed have well served President Madison's later term in office by reducing the animus and mistrust of the Federalists towards him.[143]

The best result in the Chase case would have been achieved if Federalist politicians had joined Randolph in presenting the case against him. Chief Justice Marshall in his diffident testimony may in fact have been striving to make the dispute less partisan. If only he had been more direct in doing so, he would deserve a special salute and we could point to his conduct in the Chase case as a role model for disinterested citizen-lawyers who, without regard for their partisan

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[137] An extend account of the event is 1 BEVERIDGE, *supra* note 71, at 168-220.

[138] R. ELLIS, supra note 59, at 103.

[139] Id. 100-106.

[140] For a full account, see C. PETER MCGRATH, YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC: THE CASE IF FLETCHER V. PECK (1966).

[141] Jefferson to Giles, Apr. 20, 1807, 10 THE WRITINGS OF THOMAS JEFFERSON 383, 387 (Paul Ford ed. 1899).

[142] Op cit. n. 21.

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

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connections, could and should have agreed that Chase was not fit for the office he held. It was for that reason, and not because he was a Federalist, that he should have been impeached and removed.

Where indeed were the citizen-lawyers among the Federalists in the Senate? Why did they wait until after the inauguration of President Jefferson to impeach and remove him? Had they removed him when he should have been removed, at the time when as lame ducks they were enacting the Judiciary Act of 1801, that legislation would have acquired an entirely different hue. Of course the explanation lies in large part on the partisan loyalty of Federalists to one of their own. And that sentiment should have been laid aside by those practicing the classical civic virtue of citizen-lawyers.

HOW TO REMOVE A JUSTICE

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

The problems of power-crazed abuse of lawyers and litigants such as that exhibited by Judge Ritter are less likely to occur in a multi-judge Court. And often the members of the Supreme Court have found ways to diminish harm resulting from a Justice's mental disabilities. The requirement of circuit riding imposed by the original Judiciary Act of 1789 long deterred some Justices from clinging to their office when they could not perform it. Also, for a time, it was traditional that Justices would designate one of their number to advise a senior member of the Court when his time for retirement had come.[144]

But in the 20th century, the burden of the office of a Justice was greatly diminished. Circuit riding was abolished in 1891.[145] In 1925, the Justices were empowered to control their workload,[146] a power

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[144] CARL BRENT SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW 444 (1970).

[145] Act of Mar. 3, 1891, 26 Stat. 826, § 1.

[146] Act of Feb. 13, 1925, 43 Stat. 936, § 237(b).

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extended to virtually absolute limits in 1988.[147] Their quarters were moved from the basement of the Capitol to the most pretentious building in the capital.[148] And Justices were provided with abundant staff support to which much of their work can be delegated.[149]

And the Court's political role became so enlarged that many Justices have been very reluctant to surrender their vast power, whatever their physical or mental condition. Some able to continue the work have resigned from office to avoid a risk that their successor might be named by a politically congenial President.[150] Very few have accepted the benefits offered to senior judges; being a Justice is too much fun and too little work to induce voluntary retirement by most. In 2000, David Garrow reviewed numerous cases of serious debilitation and urged a constitutional amendment to address the problem of mental decrepitude.[151] Non-constitutional remedies have also been offered in recent years: variable term limits;[152] or age limits;[153] or even a "golden parachute."[154]

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[147] Act of June 27, 19898, 102 Stat. 682; see Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81 (1988).

[148] Justice Brandeis protested that it made his colleagues into "the nine beetles of the Temple of Karnak" and would cause them to have an inflated vision of themselves. Pnina Lahav, *History in Journalism and Journalism in History: Anthony Lewis and the Watergate Crisis,* 29 J. S. Ct. HIST. 163 (2004).

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

[150] Washington Post reporter Joan Biskupic reported that Justice Byron White said he was considering retiring upon the inauguration of President Clinton: "White 'has said that since he came in with a Democratic administration, it would be fitting to retire under a Democratic administration.'" Dennis J. Hutchinson, THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE 436 (1998).

[151] *Mental Decrepitude and the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U..CHI..L..REV. 995 (2000); and see DAVID N. ATKINSON, LEAVING THE BENCH: SUPREME COURT JUSTICES AT THE END (1999).

[152] See generally REFORMING THE COURT, note 7.

[153] Richard A. Epstein, *Mandatory Retirement for Supreme Court Justices,* id. at 415.

[154] David R. Stras, *The Incentives Approach to Judicial Retirement,* 90 MINN. L. REV. 1417, 1439 (2006).

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It is important, even sometimes urgent, public business to remove Justices who are not doing their job. Surely the Constitution should not be read to prevent that result so long as the process employed to reach it is designed to minimize if not exclude the possibility that his removal is pursued for partisan political reasons. It is a task and a duty of citizen-lawyers to promote the establishment of such a process that would function without regard for the political connections of a Justice whose behavior in office is reasonably questioned.

Consider the possibility that the Republican Congress could have removed Chief Justice Rehnquist when he was plainly disabled, as he was in 2005-2006? Or earlier when he was suffering from substance addiction?[155] Was it not a duty of the citizen-lawyer to support his removal as an act needed to support the independence of the judiciary and the integrity of the law? Indeed, where was the organized bar at that time? Is it not unprofessional to prolong and protect careers of Justices who are no longer doing their jobs?

To acknowledge that Congress and the organized bar are responsible for the removal of Justices unable or unwilling to practice "good behavior" is not to join Gerald Ford in asserting that the standard for removal of a Justice is whatever the House of Representatives deems it to be.[156] Congress being what it is cannot ask itself to make disinterested non-partisan assessments of the capacities of Justices. Even if the Article II standard of "high crimes or misdemeanors" were deemed applicable, it would be appropriate for Congress to establish reasonable standards of judicial conduct outside the judges' rendition of decisions that it is not the business of Congress to review. Especially if Congress would leave the enforcement of appropriate standards to an appropriately disinterested institution.

This is essentially what Congress has done with respect to the judging of subordinate judges in the Judicial Councils scheme described above. A similar process is needed to remove non-

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[155] Questions remain about the extent of the resulting disability. Jack Shafer, *Rehnquist's Drug Habit: The Man in Full*, SLATE, September 9, 2005, http//www.slate.com/id/2125906/

[156] Statement re Impeachment of William O. Douglas "What, then, is an impeachable offense? The only honest answer is that an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history." *J.Y. Smith & Lou Cannon, Gerald R. Ford, 93, Dies; Led in Watergate's Wake,* WASH. POST, Dec. 27, 2006.

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performing Justices. Who, the reader is likely to be asking, might be qualified to judge a Justice? The Judicial Conference of the United States is the obvious choice, were it not for the fact that the chairman of the Conference is *ex oficio* the Chief Justice of the Supreme Court. [157] That arrangement was made in 1922 at the suggestion of Chief Justice Taft and has never been seriously reconsidered by the Conference or by Congress. As the power of the Conference has been steadily enlarged, a secondary effect has been to empower the Chief Justice personally. Judith Resnik has made the case for separation of the two offices. There is in fact little reason that they should be united.[158] But if her arguments cannot find traction in a passive Congress, another alternative is needed.

Creating a special forum to judge Justices that would be comparable to the Judicial Councils of the Circuit and of the review committee of the Judicial Conference is complex but not impossible. The judges who judge Justices cannot be selected by the same President who would select the replacement of the Justice who might be put on the shelf because their judgment about unfitness of the Justice would be too vulnerable to partisan suspicion. Nor can they be judged by officers of the Department of Justice, an institution litigating before the Court on a daily basis.[159] Neither can the special forum consist of other Justices or be selected by them because of mistrust this would generate between sitting Justices. Those who judge Justices would have to be mature judges, indeed, so mature that they have no hope of appointment to the Court. On the other hand, not so mature that they are themselves decrepit.

But a council of judges can be identified who share all these requisite qualities. They are the chief judges of the thirteen courts of appeals. Chief Judges are senior among their colleagues, but not too senior for they are required to surrender their administrative duties at the age of seventy.[160] Thirteen might well be deemed too large a panel,

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[157] 28 U. S. C. § 331.

[158] *Democratic Responses to the Breadth of Power of the Chief Justice,* REFORMING THE COURT, note 7, at 181.

[159] Thus, serious questions were raised about the integrity of the prosecution of Judge Harry Claiborne for tax evasion; it was suggested that the prosecution was a response to diverse rulings against the Department. See Todd C. Peterson, *The Role of the Executive Branch in the Discipline and Removal of Federal Judges,* 1993 U. ILL. L. REV. 809, 872-79 (1993).

[160] 28 U.S.C. § 45(c).

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and diverse methods of random selection might be deployed to reduce that number, perhaps by some form of rotation alternating membership annually so that the responsibility is never imposed for long on any members of that group.

Such a Council of Chief Judges might be empowered by Congress to exercise over Justices the powers that circuit councils exercise over circuit and district judges. It might receive complaints from citizen-lawyers and be empowered to order "that, on a temporary basis for a time certain," the Justice deemed unfit to hold office shall sit on no cases. Like other Councils addressing the judges that they judge, it might be empowered to censure a Justice either privately or by a public pronouncement for conduct seriously violating the standard of good judicial behavior. Or it might certify his disability or request his voluntary retirement. Or even refer a case to the House of Representatives for possible impeachment and removal.

How might such a Council of Chief Judges inform itself about the mental health and physical condition of the Justices? There is talk of establishing an Inspector General within the Judiciary not unlike other inspectors general in the federal government.[161] Such an officer if established might among his duties provide the Council with a modest investigative arm. In the alternative, the chief judges might rotate that responsibility among their thirteen member group. If there are issues of fact, a confidential hearing might be held.

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

For example, Chief Justice Marshall's conduct in the celebrated 1819 case of *McCulloch v. Maryland*[162] might have been different and less subject to reprehension by lawyers striving to impose appropriate

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[161] E.g., The Judicial Transparency and Ethics Enhancement Act of 2006, H. R. 5219, S. 2678. Unfortunately, that proposal is advanced as a partisan proposal to punish judges for incorrect decisions. David D. Kirkpatrick, *Republican Suggests Judicial Inspector General,* NEW YORK TIMES May 10, 2005.

[162] 4 Wheat. 316.

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moral standards on the judiciary. In that case, it may be recalled Maryland sued a cashier of the Baltimore branch of the Bank of the United States to collect a tax imposed by its legislature on all banks doing business in the state. The United States resisted the tax and challenged the power of Maryland to tax federal instrumentalities; Maryland in reply challenged the power of the United States to establish a bank. Marshall, for a unanimous Court, published a 37-page opinion not only confirming the position of the United States, but also laying an important stone in the development of the legal relationship between the nation and the states.

McCulloch attracted strong criticism on the merits. Critics accused Marshall and the Court of gross professional misconduct in misusing the indeterminacy of the constitutional text to achieve his political aim of denying sovereignty to the states and usurping the power and responsibility of legislative bodies.[163] The critics were surely correct that the opinion went well beyond the needs of the case. Congress had not forbidden states to tax the Bank except by loose implication; a more defensible decision would have been to uphold the state's power to tax until Congress otherwise explicitly immunized the Bank.[164] Congress was at pains to avoid providing any such immunity when the time came to extend the Bank's charter. As his critics recognized, Marshall's holding went far in embedding nationalism in the literature of the legal profession.[165] Marshall in 1832 privately expressed his astonishment that the union had lasted as long as it had.[166] But he would soon see President Andrew Jackson, no Federalist, invoke his reasoning in *McCulloch* regarding the popular source of constitutional legitimacy, when he faced down the state of South Carolina's presumption in declaring a federal tax null.[167]

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[163] E.g., JOHN TAYLOR, CONSTRUCTION CONSTRUED AND CONSTITUTIONS VINDICATED (1820).

[164] See Howard J. Plous & Gordon E. Baker, *McCulloch v. Maryland: Right Principle, Wrong Case,* 9 STAN. L. REV. 710 (1957).

[165] See the exchange between Marshall and Spencer Roane in JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND (Gerald Gunther ed.,1969).

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

[167] 2 J. D. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 1203-09 (1907).

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A serious additional problem with the decision was the fact that the Chief Justice was significantly invested in the Bank.[168] He was an original owner of 10 shares when the Bank opened in 1817. He continued to buy shares in 1818 and owned 40 shares in 1819 when he sold five shares and transferred some to other members of his family to be held in trust for his wife. These transactions occurred while the case was pending in the Supreme Court. The decision of the Maryland court had diminished the value of this investment by a third; the decision in *McCulloch* restored its value. The capital gain to himself and his family was roughly one and a half times his annual salary as Chief Justice.

The duty to recuse himself was well recognized at the time. St. George Tucker had recused himself in a previous case in which his stake was much less than that of Marshall.[169] There was no public knowledge at the time of Marshall's behavior, but the facts surfaced in 1837 in the debate on the renewal of the Bank's charter. By that time, Marshall had repossessed the shares he had transferred. His admirers and political supporters sought to conceal the facts. So did his 20th century biographer, Albert Beveridge. John Noonan explained Marshall's behavior thus:

> Marshall was committed to the cause of a national bank. Personally, a family investment was at issue. He did not want to abandon either the cause or the investment, so he did not recuse himself and he did not effectively dispose of the investment. Believing that the political cause rightly affected his views, strongly conscious of inner rectitude, and knowing that there was no power on earth to call him to account, he would not have hesitated to believe that he could fairly judge on the merits.[170]

Judge Noonan is clearly correct that such conduct, even on the part of one of our most admired Justices is both a disgrace and a product of the Justice's sense of invulnerability. Had there been a system in place to hold the Chief Justice to account for his misconduct, it seems very unlikely to have occurred.

It seems equally likely that the careers of numerous Justices would not only have ended before their physical and mental disintergration occurred, but even during earlier times in their careers

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[168] See John T. Noonan, *Bias and Biographers,* 34 ST. LOUIS L. J. 725 (1990).

[169] The case was *Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816).

[170] Note 166, at 736.

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when some Justices might have been more energetic and productive. There is no doubt that the ambition to glow in public respect has driven many Justices for very long. Or that many would leave office in a timely way to avoid a disinterested assessment of their professional competence.

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CONCLUSION

This brief essay is not the place to venture a broad assessment of the need for checks and balances to establish a healthier and more modest sense of the appropriate role of the Supreme Court. But the foregoing analyses do offer support for legislation providing for the chastisement or removal of Justices who are unfit for their offices or who are not performing their judicial duties. Such legislation is long overdue, violates no valid application of Article III of the Constitution, and merits the continued support of citizen lawyers striving to maintain the independence of the federal judiciary.