Is the Judiciary a Fragile Fortress?

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A reader would be excused for wondering if the question the title of this essay poses is merely rhetorical. After all, the Symposium announced itself to the world in a stark, declarative phrase, using the definite article and with not a question mark in sight: "The Fragile Fortress." Surely we had a clear position in mind when framing the event: the Judicial Branch is besieged, under attack from the political

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branches of the federal government—the Presidency and the Congress! One of the Symposium contributors, Judge Michael B. Mukasey,[1] takes aim at this unspoken premise with his reminder that the fundamental constitutional bases of federal judicial independence, lifetime tenure and salary protection, remain undisturbed in Article III of the Constitution, where they have been ever since 1787. Whether the judiciary is now undergoing unprecedented assaults is an open question—a case can be made that it is, but a longer, historical view raises doubts. In any case, the Symposium and its title were not based on any such assumption. Rather, seeing the independence of the courts as a vital part of the American experiment and, in the very nature of things, difficult to achieve, we sought to enlist jurists and scholars to help us reexamine the old challenges in new circumstances.

The political context in which the idea for this Symposium germinated and took root tended to put the phrase "judicial independence" in a separation-of-powers framework. Recent decades, years, and even weeks had seen an array of what arguably represented challenges to the independence of the judiciary: periodic waves of criticism from the political branches leveled at individual judges for particular decisions, on occasion including threats of impeachment; long, politically-motivated delays, indulged in at various times by both parties, in considering presidential nominations to the judiciary, and including filibustering of nominees; the use of "litmus tests" in judicial confirmation hearings; the refusal by the Senate leadership during the last eleven months of the previous administration to entertain any Supreme Court nominee proffered by the president; the apparent increase in public, out-of-court pronouncements by sitting Supreme Court justices on political matters, including a justice venting strong opinions about a presidential candidate in the recent election; a campaign of invective by the same candidate against a federal judge before whom the candidate had pending litigation; dramatically differing definitions across the political spectrum on what constitutes impermissible "judicial activism"; and various legislative attempts at "court-stripping," i.e. removing certain issues from the jurisdiction of the courts.

The judiciary's relationships with the other, coordinate branches of the federal government, then, form a crucial part of the

1. The contributions of each of the Symposium participants, including Judge Mukasey, are introduced in the second half of this essay.

story—and not just in recent times. It is no mere historical footnote that in his indictment of British colonial rule, Jefferson charged George III with having "made Judges dependent on his Will alone, for the tenure of their Offices, and the Amount and Payment of their Salaries."[2] From the beginnings of what would become this Republic, the Founders saw a secure position for judges, independent of the will of the political power (both Executive and Legislative), as crucial for liberty. Madison saw in "independent tribunals of justice" the guardian of the people's rights, "an impenetrable bulwark" against abuses of power by the other branches.[3] The "bulwark" metaphor reminds us that the imagery of fortifications has accompanied the way we think and speak about the courts from the beginning.

To remedy the twin instances of intolerable dependence cited in the Declaration of Independence, lifetime judicial tenure assumed pride of place for the Founders. Hamilton saw in this arrangement an "excellent barrier to the encroachments and oppressions of the representative body," an effective means "to secure a steady, upright, and impartial administration of the laws" and the best possible way to foster "that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty."[4] For Hamilton, "[t]he complete independence of the courts of justice [was] peculiarly essential in a limited Constitution" because such independence alone could protect the people from legislation that flouted the fundamental law.[5]

Yet the independence of the judiciary is not fully secured by the Article III protections. It cannot be. The fortress is vulnerable, and this vulnerability is in an important sense nothing new but rather a timeless and inherent characteristic of the courts. For one thing, the power of the courts to act affirmatively is severely circumscribed—a point that emerges clearly in the course of "Judicial Independence: Theory and Practice," the panel-discussion portion of the Symposium, and that Hamilton conveys with great force in *Federalist* 78. There, Hamilton characterizes the judiciary, where a separate branch, as "the

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2. THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

3. James Madison, Speech to House of Representatives (June 8, 1789), THE FOUNDERS' CONSTITUTION, http://press-pubs.uchicago.edu/founders/documents/v1ch14s50.html.

4. THE FEDERALIST No. 78, at 472 (Alexander Hamilton) (Garry Wills ed., 2003 reissue).

5. *Id.* at 473.

least dangerous" to constitutional rights because it has the "least . . . capacity to . . . injure" those rights:

> The Executive not only dispenses the honors but also holds the sword of the community. The legislature not only commands the purse but also prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse . . . and can take no active resolution whatever.[6]

The courts have neither sword nor purse but "merely judgment" and depend on the Executive to carry their judgments out.[7] However, "least dangerous" can also mean "most vulnerable." What Hamilton called the "natural feebleness of the judiciary" leaves it "in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches."[8] The famous, likely apocryphal remark attributed to President Jackson in 1832 springs to mind: on hearing of the Supreme Court's ruling in *Worcester v. Georgia*, adverse to the president's Indian Removal policy, Jackson is reputed to have said: "John Marshall has made his decision, now let him enforce it."[9]

In the phrase "unelected judges," a staple in criticism of the judiciary, the adjective is superfluous, and not a little tendentious. After all, judges are not interlopers on the constitutional scheme but rather an integral part of it. To call them "unelected," though, plays an important rhetorical role in sharpening the contention that judges too often presume to "legislate from the bench." In any event, the insulation of the courts from politics, with its sometimes wild swings of popular passions, is part of the Framers' design, not unlike the original consti-

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6. *Id.* at 472.

7. *Id.*

8. *Id.* at 472–73.

9. JON MEACHAM, AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE 204 (2008). The actual remark of Jackson's that appears to have given rise to the legendary "let him enforce it" quotation were: "The decision of the Supreme Court has fell still born, and they find that it cannot coerce Georgia to yield to its mandate." Meacham characterizes the famous phrase as "historically questionable but philosophically true." *Id.*

tutional arrangement in which an appointive Senate served as "the saucer into which we pour legislation to cool it off."[10] A check on overweening government action, a shield of the people's rights and particularly those of political minorities, a sentry standing guard in defense of federalism, the judiciary is a co-equal branch of government. Its mission is surely not to undermine the other branches, but neither is it to act as their pliant servant. Judge Calabresi has remarked that "[a]n independent judiciary which applies rules of law . . . is a pain in the neck to any government that wants to get things done."[11] Some degree of tension with the political branches seems inevitable. By the same token, though insulation from politics is in many ways an asset, it also opens the judiciary up to that epithet, "unelected."

Separation of powers issues, of course, are not all there is to judicial independence. How can we be sure that the individual judge will decide the matters before her only on the merits—strictly in accordance with law? The most egregious violation of the judicial office occurs when a judge accepts money or other inducements in exchange for a particular ruling. This is a matter of individual ethics and its potential corruption. The Old Testament admonition in Deuteronomy reminds us, too, of the other side of the transaction—the "supply side" to corruption, as it were:

> You shall appoint . . . judges and officers . . . and they shall dispense true justice to the people. You shall not pervert the course of justice or show favour, nor shall you accept a bribe; for bribery makes the wise man blind and the just man give a crooked answer. Justice, and justice alone, you shall pursue . . . .[12]

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10. This almost certainly apocryphal phrase is widely attributed to Washington, who supposedly used the image in conversation with Jefferson. THOMAS JEFFERSON'S MONTICELLO, https://www.monticello.org/site/research-and-collections/senatorial-saucer (last accessed Aug. 10, 2017).

11. Guido Calabresi, *The Current, Subtle and Not-So-Subtle Rejection of an Independent Judiciary*, 4 U. PA. J. CONST. L. 637, 637 (2002). Judge Calabresi makes some fascinating remarks on how the legal formalism and commitment to received traditions on the part of the Italian judicature in the 1920s "got in the way" of the Fascist government and its functionalist view of law as a mere instrument of policy. *Id.* at 637–38.

12. Deuteronomy 16:18–20 (New English Bible).

The liberal tradition is focused on the potential for tyranny from government; but in the American political heritage, perhaps most notably in Jefferson, we also find a wariness of the concentration of economic power in private hands. Such power, too, can sometimes pervert justice. Interestingly, one circumstance where this danger rears its head is where judgeships are elective (as they are in a majority of jurisdictions in the United States) and judges face the need to raise campaign funds. A Florida case, *Williams-Yulee*, involved a First Amendment challenge to the state's restrictions on direct solicitation of campaign funds by judges. Symposium contributor Professor Eric Kasper elucidates how the U.S. Supreme Court decided the case, holding that the Florida restrictions passed strict scrutiny. Most importantly, Professor Kasper shows us, the Court saw the state's interest in safeguarding the integrity of the judiciary—including a public perception of integrity—as compelling. However, the 5-4 decision exposed fractures over whether the Florida rule was narrowly tailored.

That "no man can be a judge in his own cause"—*nemo iudex in causa sua*, in Latin—is a bedrock principle of justice. As Madison put it in *Federalist* 10: "No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."[13] This principle can be seen to apply far more widely than merely those flagrant instances where judge is also party. For instance, it clearly applies to the bribe: there, the judge becomes in effect an interested party to the transaction—to borrow an idea from contract law, a "third party beneficiary" to the outcome of the case. The judgment that follows will no longer be independent, and the judge no longer carrying out his duty.

The inducements need not be directly monetary; subtler temptations can whisper in the judge's ear. An important current of legal scholarship, Judge Posner's work likely being the most visible, interprets judicial behavior as that of rational actors attempting to maximize their returns in the form of career advancement.[14] A key interest of Posner and his colleagues is the phenomenon of "dissent aversion," which they associate with judges' career-oriented rational choices.

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13. THE FEDERALIST No. 10, at 53 (James Madison) (Garry Wills ed., 2003 reissue).

14. *See* Richard A. Posner, William M. Landes & Lee Epstein, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEG. ANALYSIS 101 (2011).

The sometimes complex calculus that goes into the decision of whether and how to dissent on multi-judge courts is examined in these pages by Symposium contributor Judge Bernice B. Donald. One of her contentions is that, where dissent is withheld for reasons of professional self-interest, justice is ill-served. Judge Donald sees the continued vitality of dissent as an important pillar for judicial independence, lending more value to assent by helping ensure that it is freely given, in her words, "from the wellsprings of legal conscience."

Just as a judge in a plea colloquy pursuant to Federal Rules of Criminal Procedure 11 asks the defendant about any coercion or inducements to his plea, so we must contemplate that even judges may be subject to intimidation or coercive force. Coercion at gunpoint is the most extreme case imaginable, one where the judge's capacity for independent action is most constrained. Thankfully, this situation is extraordinarily rare in the United States, but it has occurred. Symposium contributor Judge Timothy Corrigan was the target of a horrifying assassination attempt by a defendant. We are fortunate that he survived it, and that he is willing to share with us his harrowing story—and also his vision of judicial duty performed with conscientiousness and genuine modesty.

Not as dramatic as physical threat, but hardly to be dismissed, is the potential coercive effect of the threat of impeachment. The specter of political trial and possible removal from office, if generally remote, certainly can cast a looming shadow. Symposium contributor Judge R. David Proctor's examination of a number of historical threats to judicial independence—a principle he contends has proven its resilience in the face of repeated challenges—includes a riveting look back at the drama of the early-nineteenth-century impeachment trial of Justice Samuel Chase, an appointee of President Washington. The Senate's eventual acquittal of Chase, Judge Proctor underscores, helped solidify the norm that impeachment was a remedy for judicial misconduct—not a weapon for Congress to wield because it substantively disagreed with a judge's decisions.

A kindred principle came to the fore in the recent crisis in Costa Rica over the removal of a Supreme Court justice by the legislature, apparently for political reasons. Symposium contributor Chief Justice Zarela Villanueva Monge recounts the dramatic events, including the wave of legal, judicial, and popular protests that led to the justice's restoration and the reaffirmation of the principle of non-removability

save for misconduct. Dr. Villanueva contributes the invaluable dimension of comparative legal systems to the Symposium, as Costa Rica's constitutional scheme features legislative selection of Supreme Court justices to ten-year terms, with renewal considered virtually automatic barring grave misconduct. Indeed, so unthinkable had non-renewal been for some three-quarters of a century, in fact, that from a legal-realist perspective the Costa Rican scheme could be viewed as almost equivalent to Article III life tenure. These details remind us that our institutional arrangements are neither the only ones imaginable, nor the only ones the Framers considered.

Though seemingly trivial next to the impeachment of a Supreme Court justice, the events related by Symposium contributor Professor John DiPippa were just as profound in their constitutional implications—and by no means lacking in drama. The recent attempt by an Arkansas legislative committee to subpoena a sitting state judge so as to question her about the substance of certain of her decisions turns out to have been virtually without historical precedent in this country. Though the committee finally withdrew the subpoena, averting a crisis, Professor DiPippa is unflinching in exposing the grave separation of powers problems affecting such a proceeding, while giving thoughtful consideration to ways in which a legislature might obtain legitimate and necessary cooperation from the judiciary.

A legislative–judicial conflict at the federal level is the subject of Symposium contributor Judge Sterling Johnson, Jr., who shares his recollections of the battle over the Feeney Amendment and its restrictions on judicial sentencing discretion. Judge Johnson, one of dozens of federal judges who publicly objected to the statute and its application, took particular exception to Congressional requirements that individual judges' sentencing practices be tabulated and reported to the Congress, and that pre-sentencing reports on defendants be shared with Congress upon request. On another April 7, thirteen years earlier, Judge Johnson issued a remarkable order, reproduced in these pages—his response to the statute, a glimpse into one judge's understanding of judicial independence.

Unlike the Feeney Amendment, which was actually enacted into law, the subject Symposium contributors Professor Justin Walker and Caroline Phelps explore is a reform that has been proposed on several occasions but never passed Congress: to require that, on retirement or taking senior status, federal judges' bench memoranda and

other judicial papers be publicly released. Walker and Phelps cast the issue in separation of powers terms, tracing intriguing parallels and contrasts with assertions of executive privilege. Inviting us to imagine the effects an analogous rule might have had at Philadelphia in 1787, they argue that such "transparency" would likely be inimical to the judiciary's ability to perform its Constitutional duties.

Another Symposium contributor, and the only one to have served in the upper reaches of both Judiciary and Executive, former United States District Judge and former United States Attorney General Michael B. Mukasey sounds a cautionary note about judicial independence. For Judge Mukasey, if the fortress is shaky it is in significant measure due to problems within. He argues that the judiciary endangers its own independence by too often attempting judicial solutions to all manner of social ills not properly within the province of the courts; reading rights into the Constitution that are not to be found there; and intruding into such prerogatives of the Executive as national security. With respect to this last, Judge Mukasey alludes trenchantly to the recent conflicts between the courts and the new administration over the latter's measures to restrict temporarily the entry of foreign nationals from certain Middle Eastern countries.

Undoubtedly, the high-school civics version of the separation of powers is an uneasy fit with reality—for instance, numerous Executive agencies adjudicate (though with judicial review); Congress can and does delegate legislative power; and over the centuries courts have performed a legislative sort of function through the development of case law. Among these cross-cutting arrangements are two regimes involving a high degree of judicial deference to the Executive Branch: the *Chevron*[15] doctrine of deference to a federal agency's interpretation of its own statutory authority, and the mechanism by which secretly-collected intelligence evidence is introduced in criminal proceedings. Regarding the first, Symposium contributors Nicholas R. Bednar and Barbara Marchevsky deftly analyze *Chevron* and the other signal cases relating to "agency deference." Incorporating comparative law analysis into their study, they argue that the administrative state in its current incarnation poses significant problems for the rule of law. Bednar and Marchevsky contend that a strong deference regime is irreconcilable

15. Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

with our constitutional scheme and advocate adoption by the courts of a more limited and flexible test.

Symposium contributor Professor Patrick Walsh addresses the second arrangement, in an area of even stronger judicial deference to the Executive—national security. He sees the recent "amicus curiae" reform of the Foreign Intelligence Surveillance Act ("FISA") regime as positive, while advocating further reform; he proposes creation of a panel of cleared defense counsel who can examine FISA evidence and file motions to suppress on behalf of defendants in ordinary federal criminal proceedings—enabling meaningful confrontation with regard to such evidence. Professor Walsh calls us back to first principles: the Executive's duty to defend national security right up to constitutional limits, and the courts' duty protect the people's rights, ensuring that agencies do not cross beyond those limits.

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The pages that follow are brimming with gifts— legal analysis, constitutional reflection, historical insight, and wisdom gleaned from experience. That the contributors do not always agree with one another is not the least of these gifts, the better to stimulate our creative thinking as readers, citizens, students, teachers, legislators, attorneys, clerks, and judges. Sparks fly at several points in the panel discussion, a conversation marked by much wit and learning; the richness of the exchange of ideas throughout "Judicial Independence: Theory and Practice" is one of the Symposium's highlights. Perhaps nowhere is the dialogue so vibrant as on the vexing matter of precedent: what it is, how and when it controls, and under what circumstances it can or should be broken with, along with the related question of the ways in which judges are bound by statute. And what, exactly, makes a judge "activist?" As the judges take center stage to grapple with these timeless controversies, ably aided by the scholars on the panel and audience participants, all who care about the law are privileged to listen in on the most engaging "shop talk" imaginable.

Judicial independence, a noble ideal, has always been a practical challenge—neither simple to define, nor easy to achieve. Designing and implementing it taxed the considerable intellectual and political resources of the Founders and continues to bedevil us today. Yet

how much depends on the judiciary! What is at stake in the courts' fulfilling their constitutional mission and dispensing "equal justice under law"[16] is nothing less than the just prosecution of crimes, the fair resolution of disputes, the healthy interplay of the branches of government, and the secure shielding of the people's rights.

Sadly, the nobility of the American experiment does not entitle this nation, as Justice Davis warned us a century and a half ago, "to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution."[17] Human fallibility and human ambition are inescapably part of our condition, and these things do not magically stop at the White House portico, or the Capitol steps, or the door to courthouse chambers. We humans are fragile, and because the fortress of the judiciary is something we have made and are bound to preserve, it too shares our fragility. The jurists and scholars whose words grace the pages that follow help us deepen our understanding of the courts' difficult but vital task. And perhaps, gentle reader, you will find on one or more of those pages an insight or an inspiration that will enable you better to understand, value, and find your own way to help defend this remarkable thing that the late Sen. Sam J. Ervin of North Carolina called "the most essential safeguard of a free society."[18]

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16. This phrase, carved under the pediment of the Supreme Court Building in Washington, is of uncertain origin; it may have been a suggestion made "by or through the distinguished architect of the Supreme Court building, Mr. Cass Gilbert" and approved by Chief Justice Charles Evans Hughes, who presided over the Court during the building's construction in the 1930s. Erwin N. Griswold, *Equal Justice Under Law*, 33 WASH. & LEE L. REV. 813, 814–15 (1976).

17. Ex parte Milligan, 71 U.S. 2, 125 (1866).

18. Quoted in Robert R. Kuehn, *Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic*, 4 WASH. U. J.L. & POL'Y 33, 140 n.489 (2000).

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