

# An Overview of Judicial Independence from Impeachments to Court-Packing

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## I. INTRODUCTION

This essay focuses on the historical challenges that political entities have posed to the federal courts and the independence of federal judges.<sup>1</sup> Throughout the past twenty years, many observers have complained about a purported uptick in attacks on judicial independence. These potential attacks have sometimes been accompanied by proposals to eliminate lifetime appointments for Article III judges, curtail

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1. This essay also owes a significant debt to the late Chief Justice William H. Rehnquist's writings on the historical development of judicial independence, the impeachment of Justice Samuel Chase, and the court-packing plan proposed by President Franklin Roosevelt. I have borrowed heavily from his fine work.

the federal courts' subject matter jurisdiction or ability to cite disfavored precedent, and mandate video coverage of Supreme Court oral arguments or other federal court proceedings. But recent attacks by elected officials on judicial independence have not arisen in a vacuum. Some argue that these attacks are the result of interference by courts in the political process. It must be remembered that judicial independence is always entrusted to the jurist so that she may neutrally apply the law to a case without fear of political interference. Whenever a jurist significantly departs from the neutral application of the law, the judiciary's independence is damaged. On the one hand, some citizens may question whether a judiciary separated from the electoral system actually interprets the law enacted by our elected representatives or expands it. On the other hand, different citizens may question whether the judge is ruling in a way that recognizes the judiciary stands between the individual and government overreach. Certainly, whatever political pressure is actually placed on the judiciary does not arise from a historical void. To be sure, there are those who wish to affect the judiciary and its rulings—but there always have been. So, how are we to consider and deal with these challenges? I will leave to others (or, at least for another day) the discussion of modern challenges to judicial independence.<sup>2</sup>

In this essay, I will discuss in Section II the basics of judicial independence and the infancy of the federal courts. Next, in Section III, I will address the Senate's trial of Justice Samuel Chase in 1805, which demonstrates the proper limits of Congress's role in policing judicial behavior. In Section IV, I will take up the infamous court-packing scheme proposed by President Franklin Roosevelt, which underscores the importance of the executive branch's support of judicial independence. Finally, in Section V, I will briefly cover the quick and decisive response by Congress and the states to an early Supreme Court decision in *Chisholm v. Georgia*.<sup>3</sup> In *Chisolm*, the Court (at least temporarily) broadened its own jurisdiction over cases against state governments, but Congress and the states abrogated that decision upon

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2. I recognize that there has been scholarly and media attention paid to the questions surrounding purported modern-day attacks on judicial independence from all corners of our society. Some of the attacks have been petty and impotent; others aggressive and ill-motivated; and still others the natural consequence of potential judicial overreach. But this paper addresses none of these.

3. 2 U.S. (2 Dall.) 419, 479 (1793).

passage of the Eleventh Amendment.<sup>4</sup> Justice Samuel Chase's trial and President Roosevelt's court-packing scheme, two challenges to judicial independence, occurred during periods where one party held both a Congressional supermajority and control of the presidency. Yet, as it turns out, and as this essay discusses, judicial independence proved to be particularly strong in each instance.

## II. BASICS OF JUDICIAL INDEPENDENCE AND THE INFANCY OF THE FEDERAL COURTS

The pillars of judicial independence are well-known, well-settled, and well-established in our federal Constitution. Federal judges receive life tenure and "shall hold their Offices during good Behaviour."<sup>5</sup> They face no term limits, no mandatory retirement age, and no retention elections.<sup>6</sup> Federal judges also receive a salary that cannot be reduced by Congress.<sup>7</sup> These constitutional protections insulate them from undue political pressure and form the core of a broader principle of judicial independence that has developed through our republic's history. Two decades ago, an American Bar Association report described two different components of judicial independence.<sup>8</sup> First, decisional independence protects judges from being removed from office or having their pay cut for unpopular judicial opinions.<sup>9</sup> Second, institutional independence protects intra-judicial institutions from interference by other branches of government and allows judges some degree of deference in the management of court-related affairs.<sup>10</sup>

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4. See Clyde E. Jacobs, *Prelude to Amendment: The States Before the Court*, 12 AM. J. LEGAL HIST. 19, 19 & n.2, 22 (1968) (describing the events that led to the passage of the Eleventh Amendment).

5. U.S. CONST., art. III, § 1.

6. *Id.*

7. *Id.*

8. COMM'N ON SEPARATION OF POWERS & JUDICIAL INDEP., ABA, AN INDEPENDENT JUDICIARY 11–14 (1997), [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/government\\_affairs\\_office/indepenjud.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/government_affairs_office/indepenjud.authcheckdam.pdf).

9. *Id.* at 11–12. However, this form of independence does not shield judges from criticism of their opinions, even pointed criticism from political actors. *Id.* at 12.

10. *Id.* at 12–14.

To be sure, the tenets of judicial independence in Article III were not adopted without controversy. At the time of the Constitutional Convention, some of the states had limited terms of office for judges.<sup>11</sup> And many states gave their legislatures more control over judges by allowing legislatures to elect judges or remove them by joint address.<sup>12</sup> One vocal opponent of the Constitution complained that lifetime tenure was unnecessary for judges in a republic because, unlike British judges, they did not preside under a king.<sup>13</sup> In responding to critics of lifetime tenure, Alexander Hamilton rested on the need for a judiciary that secured “a steady, upright, and impartial administration of the laws,” even when impartial administration was opposed by the government’s representative bodies.<sup>14</sup>

Alexander Hamilton’s description of the judiciary as the weakest and least powerful branch certainly was true during the republic’s first decade. Chief Justice William H. Rehnquist observed that the Supreme Court only decided “about sixty cases in the first ten years of its existence.”<sup>15</sup> The Court’s justices traveled around the nation as circuit judges because the Judiciary Act of 1789 had created circuit courts without providing positions for circuit judges.<sup>16</sup> Some justices even served in non-judicial roles. For example, Chief Justice John Jay

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11. See Martha Andes Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135, 140–43 (1969) (asserting that New Jersey’s supreme court judges were appointed to seven-year terms, Pennsylvania’s judges were appointed to seven-year terms, Vermont’s judges were elected to one-year terms, and Georgia’s judges were elected to three-year terms).

12. See *id.* at 140–44 (describing legislative election or appointment of judges in New Jersey, New York, Pennsylvania, Vermont, North Carolina, South Carolina, Georgia, and Virginia).

13. Brutus, *Essay XV*, in THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 323–24 (Ralph Ketcham ed., 1986).

14. THE FEDERALIST No. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

15. Chief Justice William H. Rehnquist, Reflections on the History and Future of the Supreme Court of the United States (June 16, 2000), [https://www.supremecourt.gov/publicinfo/speeches/sp\\_06-16-00.html](https://www.supremecourt.gov/publicinfo/speeches/sp_06-16-00.html).

16. See Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1757 (2003) (explaining that Congress did not create circuit judgeships due to cost and to increase the finality of trials).

helped negotiate a treaty with Great Britain that resolved ongoing disputes following the Revolutionary War.<sup>17</sup> Chief Justice Oliver Ellsworth served as an envoy to France during the administration of President John Adams.<sup>18</sup> Moreover, when the federal government moved from Philadelphia to Washington, D.C., the architects and planners of the new capital seemingly forgot the Supreme Court, as it did not receive a separate building to house itself and was forced to hold oral arguments in a basement room of the U.S. Capitol.<sup>19</sup> Thus, in addition to its undistinguished stature, the Supreme Court consisted of justices who were not separated (politically or spatially) from the executive and legislative branches.

In 1800, Thomas Jefferson won a watershed presidential election, but in those days, the inauguration trailed the behind the presidential election by a period of months, not days. With his days numbered, and an eye toward augmenting a Federalist judiciary, President Adams took full advantage of his last four months in office. Thus, during his last four months in office, Adams first appointed John Marshall, the outgoing Secretary of State, as Chief Justice of the United States.<sup>20</sup> Adams and the Federalists in Congress also approved the Judiciary Act of 1801, which created circuit judgeships for the lame-duck administration to fill.<sup>21</sup> In 1802, the incoming Republicans repealed the Judiciary Act of 1801 and abolished the judicial offices created by the Federalists.<sup>22</sup> Moreover, Congress cancelled one of the Supreme

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17. See David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1155 (2000).

18. Natalie Wexler, *In the Beginning: The First Three Chief Justices*, 154 U. PA. L. REV. 1373, 1400 (2006).

19. See Akhil Reed Amar, *Architexture*, 77 IND. L.J. 671, 679 (2002) (asserting that the Supreme Court met in a small room in the Capitol during the early 1800s and a basement courtroom following the War of 1812, and that the Court did not convene in a separate building until the 1930s).

20. Charles F. Hobson, *Defining the Office: John Marshall as Chief Justice*, 154 U. PA. L. REV. 1421, 1423 (2006).

21. Thomas I. Vanaskie, *The Independence and Responsibility of the Federal Judiciary*, 46 VILL. L. REV. 745, 754 (2001).

22. See Michael J. Gerhardt & Michael Ashley Stein, *The Politics of Early Justice: Federal Judicial Selection, 1789–1861*, 100 IOWA L. REV. 551, 573 (2015).

Court's terms in 1802, which inhibited the Supreme Court from reviewing the constitutionality of the repeal.<sup>23</sup>

### III. THE FIGHT ON IMPEACHMENT: A LEGISLATIVE ASSAULT ON JUDICIAL INDEPENDENCE

In the early 1800s, Congress's displeasure with the judiciary extended beyond the repealed Judiciary Act of 1801. As shown by James Madison's refusal to deliver the midnight commissions signed by President Adams, the Republicans also held a strong distaste for the judges on the federal bench. At that time, the federal bench strongly leaned Federalist.

The Constitution only allowed one avenue for Congress to remove an Article III judge: impeachment.<sup>24</sup> But, in those early years, that road had not yet been traveled. The Republicans began to search for a suitable test case. They first settled upon Judge John Pickering, a district court judge in New Hampshire whom Justice Rehnquist once described as "mentally deranged and frequently intoxicated."<sup>25</sup> There is little doubt that Pickering was unfit for office.<sup>26</sup> His condition had led a circuit court to reassign his duties to another judge.<sup>27</sup> The essential issue in the impeachment was whether Pickering's alcoholism and intemperate nature constituted a high crime or misdemeanor.<sup>28</sup> The Constitution notably lacked a procedure for anyone—president, Congress, or a court—to remove a federal judge from the bench due to

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23. *Id.*

24. See Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1804 (2006). ("[I]mpeachment is the only means by which members of Congress may target specific judges for removal.")

25. Hon. William H. Rehnquist, *Judicial Independence*, 38 U. RICH. L. REV. 579, 583 (2004).

26. See *id.* ("There was no question that Pickering was a disgrace to the judiciary and should have resigned . . .").

27. EMILY FIELD VAN TASSEL & PAUL FINKELMAN, *CONG. QUARTERLY, IMPEACHABLE OFFENSES: A DOCUMENTARY HISTORY FROM 1789 TO THE PRESENT* 91–92 (1999).

28. See Rehnquist, *supra* note 25, at 583.

disability.<sup>29</sup> In the Federalist Papers, Hamilton had warned that a disability provision “would either not be practiced upon or would be more liable to abuse than calculated to answer any good purpose.”<sup>30</sup>

Nevertheless, in March 1803, the House of Representatives impeached Pickering.<sup>31</sup> Almost one year later, the Senate voted to convict and remove him from office.<sup>32</sup> The vote was strictly along party lines: all of the Democratic-Republicans had voted “guilty” and all of the Federalists had voted “not guilty.”<sup>33</sup> Given the supermajority the Democratic-Republicans held in the Senate, its vote on Pickering’s impeachment boded poorly for the judiciary’s independence.

Smelling blood, the House of Representatives then set its sights on a much more prestigious target: Justice Samuel Chase of the Supreme Court. Chase was one of six members of the Supreme Court and one of the justices appointed by President Washington.<sup>34</sup> As a Maryland lawyer and politician, Chase had been an anti-Federalist and had stridently opposed the ratification of the federal Constitution.<sup>35</sup> But by the time of his appointment to the Supreme Court, he had opportunistically become a staunch Federalist.<sup>36</sup> Chase even campaigned

29. See, e.g., Paul E. McGreal, *Impeachment as a Remedy for Ethics Violations*, 41 S. TEX. L. REV. 1369, 1380 (2000) (describing the lack of a removal procedure for judges suffering from a disability).

30. THE FEDERALIST No. 79, *supra* note 14, at 473 (Alexander Hamilton).

31. Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713, 758 (2008).

32. *Id.*; Adam A. Perlin, *The Impeachment of Samuel Chase: Redefining Judicial Independence*, 62 RUTGERS L. REV. 725, 741 (2010).

33. Rehnquist, *supra* note 25, at 583.

34. Paul D. Carrington & Roger C. Cramton, *Original Sin and Judicial Independence: Providing Accountability for Justices*, 50 WM. & MARY L. REV. 1105, 1121 (2009).

35. See Stephen B. Presser, *The Original Misunderstanding: The English, the Americans, and the Dialectic of Federalist Constitutional Jurisprudence*, 84 NW. U. L. REV. 106, 110 (1989) (stating that Justice Chase “began his political career as a demagogic Anti-Federalist and as a virulent opponent of the Constitution”).

36. See *id.* (noting that Justice Chase “became associated with the Federalists in their battles against the Jeffersonian Republicans”); Stephen B. Presser, *Samuel Chase: In Defense of the Rule of Law and Against the Jeffersonians*, 62 VAND. L. REV. 349, 349 (2009) [hereinafter Presser, *Samuel Chase*] (“Chase is remembered as a rabid Federalist partisan and a vehemently anti-Jeffersonian judge.”).

for President Adams's reelection in 1800,<sup>37</sup> an action categorically prohibited by modern judicial ethics rules, and which was at least troubling in the Wild, Wild West days of the early Court.<sup>38</sup> Back then, it was not uncommon for a Supreme Court Justice to attend to "lower court" duties, such as presiding over trials or attending to grand juries. Chase had presided over two controversial trials in 1800: the Fries trial and the Callender trial.<sup>39</sup> In addition, Chase had given a grand jury charge in 1803 that had condemned the repeal of the Judiciary Act and Maryland's expansion of the right to vote.<sup>40</sup> Chase had gone so far as to assert that the expanded right to vote would turn Maryland's state government into a "mobocracy."<sup>41</sup> When Jefferson heard in May 1803 of Chase's jury charge, he asked Joseph Nicholson, one of the Republican leaders in the House of Representatives, to investigate Chase:

Ought this seditious and official attack on the principles of our Constitution, and on the proceedings of a State, to go unpunished? [A]nd to whom so pointedly as yourself will the public look for the necessary measures? I ask these questions for your consideration, for myself it is better that I should not interfere.<sup>42</sup>

The articles of impeachment included charges related to Chase's Baltimore grand jury charge mentioned above and the following trials of John Fries and James Callender.<sup>43</sup>

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37. Presser, *Samuel Chase*, *supra* note 36, at 349–50 (asserting that Justice Chase "went out on the political hustings to give speeches in support of a presidential candidate he favored (John Adams) and against one he feared (Thomas Jefferson)").

38. See CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 5(A)(2) (2014) (prohibiting federal judges from making speeches for political candidates, publicly endorsing candidates, or publicly opposing candidates).

39. These trials are discussed further *infra* on pages 1155–56.

40. See L.A. Powe, Jr., *The Politics of American Judicial Review: Reflections on the Marshall, Warren, and Rehnquist Courts*, 38 WAKE FOREST L. REV. 697, 705 n.59 (2003) (discussing the contents of Chase's grand jury charge).

41. *Id.*

42. Letter from Thomas Jefferson to Joseph H. Nicholson (May 13, 1803), in 10 THE WRITINGS OF THOMAS JEFFERSON 387, 390 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903).

43. See Rehnquist, *supra* note 25, at 584.



The John Fries trial involved allegations that Fries led a 1799 uprising by Pennsylvania taxpayers that, among other things, had harassed tax collectors and prevented them from carrying out their duties.<sup>44</sup> For similar conduct, Fries likely would be charged with obstruction of justice today.<sup>45</sup> But, in 1800, he faced treason charges. Before trial, Chase issued an opinion that foreclosed Fries's primary defense and ruled that "the court would act as counsel for the prisoner" when Fries's attorney withdrew from the case.<sup>46</sup> Fries was tried twice, convicted twice, and sentenced to death following his second trial.<sup>47</sup> But, ultimately, at the eleventh hour, John Adams pardoned Fries—against the advice of his Cabinet.<sup>48</sup>

The second trial involved James Callender, who was tried under the hated Sedition Act of 1798, a (questionable at best) law that was passed to repress political opposition against the Federalists.<sup>49</sup> Callender, a well-educated Scotsman, had been indicted for publishing a pamphlet entitled "The Prospect Before Us," which accused Adams of being a monarchist.<sup>50</sup> Chase purportedly procured the indictment against Callender himself after reading the pamphlet during a trip from Maryland to Richmond.<sup>51</sup> During Callender's libel trial, Chase pretermitted the defendant's argument that his libelous statements were political opinions and prevented the defense attorneys from contesting the constitutionality of the Sedition Act before the jury.<sup>52</sup> Callender

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44. See Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 905 (2006).

45. Rehnquist, *supra* note 25, at 585 (noting the relative unserious nature of Fries's actual acts, when compared to treason).

46. Larson, *supra* note 44, at 906–07 (discussing Case of Fries, 9 F. Cas. 924 (Chase, Circuit Justice, C.C.D. Pa. 1800) (No. 5127), in which Chase ruled on the definition of levying war against the United States).

47. *Id.* at 906–07 (discussing Justice Chase's participation in the presiding panel during the second trial); Rehnquist, *supra* note 25, at 585.

48. Larson, *supra* note 44, at 907.

49. Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired 1801).

50. See David Jenkins, *The Sedition Act of 1798 and the Incorporation of Seditious Libel into First Amendment Jurisprudence*, 45 AM. J. LEGAL HIST. 154, 193 (2001).

51. *Id.*

52. *Id.* at 194.

was convicted, fined \$200, and sentenced to nine months in the Richmond jail for libel.<sup>53</sup>

Justice Chase's trial before the Senate opened on February 4, 1805.<sup>54</sup> Interest naturally focused on the principals in the forthcoming drama. The presiding officer over the trial was Aaron Burr, who was both Vice President and a fugitive from justice following his infamous and deadly duel with Alexander Hamilton.<sup>55</sup> According to Justice Rehnquist, one cynic remarked "that whereas in most courts the murderer is arraigned before the judge, in this court the judge was arraigned before the murderer!"<sup>56</sup> Chase's impeachment trial lasted "ten full days, and more than fifty witnesses testified."<sup>57</sup> Justice Rehnquist, an expert on the history of American impeachments, appraised the strength of the charges dimly:

Judged from the perspective of history, the charges against Justice Chase with respect to the trial of John Fries for treason did not amount to much. The charges against him in connection with the trial of James Callender were a mishmash of minor claims of error mixed with serious charges of bias and partisanship. Justice Chase's charge to the Baltimore grand jury had been something of a political harangue, but other judges of that time had similarly indulged themselves.<sup>58</sup>

The closing arguments to the Senate began on February 20th. In the tradition of that time, the arguments lasted for several days. The managers supporting impeachment focused on Chase's partisan acts

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53. Perlin, *supra* note 32, at 736.

54. *Senate Prepares for Impeachment Trial*, U.S. SENATE, [https://www.senate.gov/artandhistory/history/minute/Senate\\_Tries\\_Justice.htm](https://www.senate.gov/artandhistory/history/minute/Senate_Tries_Justice.htm) (last visited Apr. 14, 2017).

55. Vice-President Burr killed Alexander Hamilton during a duel on July 11, 1804. Thereafter, he was indicted for murder in both New York and New Jersey. See Eric M. Freedman, *The Law as King and the King as Law: Is a President Immune from Criminal Prosecution Before Impeachment?*, 20 HASTINGS CONST. L.Q. 7, 22 (1992).

56. Rehnquist, *supra* note 15.

57. *Id.*

58. *Id.*

and argued that his politically-charged charges had undermined judicial independence.<sup>59</sup> In response, Chase's attorneys reiterated that the Constitution did not provide for impeachment based on judicial errors alone.<sup>60</sup>

On March 1, 1805, the Senate voted on the impeachment charges.<sup>61</sup> At this time, there were twenty-five Republicans and nine Federalists in the Senate.<sup>62</sup> If the senators had voted along party lines, the necessary two-thirds majority for a conviction would have been achieved.<sup>63</sup> But moderate Republicans aligned with the Federalists and voted for acquittal.<sup>64</sup> On the charges from the Fries trial, sixteen senators voted to convict Chase and eighteen voted for acquittal.<sup>65</sup> On the charges from the Callender trial, eighteen senators voted for conviction and sixteen voted for acquittal.<sup>66</sup> Finally, nineteen senators voted to remove Chase from office for the charges based on his partisan 1803 grand jury charge and fifteen voted against.<sup>67</sup> The impeachment managers failed to gain the requisite two-thirds majority on any of the charges.<sup>68</sup>

Chase's acquittal refuted the notion (popular among many Republicans at that time) that impeachment could be used by Congress to sanction conduct in the course of a judge's duties. Chief Justice Marshall understood the threat that such a use of impeachment could cause. In a letter to Chase before the impeachment trial, Marshall proposed granting appellate jurisdiction to Congress because "[a] reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than a removal

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59. Perlin, *supra* note 32, at 766–67.

60. *Id.* at 767–68.

61. *Id.* at 780.

62. Rehnquist, *supra* note 15.

63. Perlin, *supra* note 32, at 781 (“Historian Jane Shaffer Elsmere has noted that had twenty-four of the twenty-five Democrats voted Chase guilty, the nine Federalist Senators could not have saved him.”).

64. *Id.*

65. Rehnquist, *supra* note 15.

66. *Id.*

67. *Id.*

68. *Id.*

of the Judge who has rendered them unknowing of his fault.”<sup>69</sup> However, rather than swinging the pendulum towards non-judicial review of Supreme Court opinions, Chase’s acquittal helped create the political norm that “impeachment should not be used to remove a judge for conduct in the course of his judicial duties.”<sup>70</sup>

Nevertheless, Congress has retained a role in policing judges’ behavior by initiating several dozen investigations of federal judges and by impeaching and removing judges from office.<sup>71</sup> Unlike Chase’s impeachment, these judges were placed on trial by Congress for serious criminal or ethical violations that imperiled their abilities to neutrally perform their offices.<sup>72</sup> With the exception of Judge Pickering and one other judge who was impeached for supporting the Confederacy, Congress has only removed judges from office for actions such as tax evasion, accepting bribes, and serious illegal misconduct—that is, misbehavior which plainly interferes with the integrity of a judge’s office.<sup>73</sup> Moreover, Congress has granted the lower courts independent power to conduct investigations against judges, determine whether impeachment is warranted, and either discipline the judge or send a determination that impeachment is warranted to the House of Representatives for further consideration.<sup>74</sup> Thus, while Congress retains

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69. 3 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL 176–77* (1919) (including the letter written by Marshall).

70. Rehnquist, *supra* note 15.

71. Todd D. Peterson, *The Role of the Executive Branch in the Discipline and Removal of Federal Judges*, 1993 U. ILL. L. REV. 809, 813.

72. *See id.* at 813 & n.5, 821–26 (providing specific instances of the types of conduct that have led to a federal judge’s impeachment and removal from office); Michael P. Seng, *What Do We Mean by an Independent Judiciary?*, 38 OHIO N.U. L. REV. 133, 141 n.53 (2011) (describing two offenses for which federal judges have been impeached and removed from office).

73. Judges have been removed from office for instances of misconduct, including (1) support of the Confederacy, (2) using a judicial office for personal profit, (3) receiving kickbacks and other payments from litigants, (4) accepting bribes related to a criminal case before the judge, (5) filing false tax returns, (6) committing perjury before a grand jury investigating an illegal gift, and (7) accepting money from attorneys appearing before his court. Peterson, *supra* note 71, at 813 n.5, 821–26; Seng, *supra* note 72, at 141 n.53.

74. *See* 28 U.S.C. §§ 354, 355 (2013) (allowing the Judicial Council for a Circuit Court of Appeals to conduct additional investigations of a judge and permitting the Judicial Conference of the United States to determine that impeachment is warranted).

constitutional authority to remove judges who commit gross misconduct, it has in fact quite properly ceded some of its own institutional independence to the federal courts to investigate, censure, and police their own.

#### IV. THE FIGHT AGAINST COURT-PACKING: AN EXECUTIVE ASSAULT ON JUDICIAL INDEPENDENCE

In the twentieth century, the most severe assault on the Supreme Court's independence—President Roosevelt's court-packing plan—came from the executive branch, not Congress. An argument can be made that an attack on judicial independence originating from the executive branch is even more worrisome to our judicial system than one by Congress.<sup>75</sup> This is so because, in the most contentious and politically volatile cases, the judiciary relies on the executive branch to enforce its orders when the lawless seek to defy them.<sup>76</sup> And the judiciary's faith in the backing of the executive branch can be impaired by executive incursions upon judicial independence.

The court-packing saga began in 1936, when the Supreme Court was sharply divided between a four-justice conservative bloc (known derisively as the Four Horsemen) and a three-justice liberal bloc.<sup>77</sup> The "balance of power" lay with two moderate justices: Chief Justice Charles Evans Hughes and Justice Owen Roberts.<sup>78</sup> In fact, Chief Justice Hughes swung back and forth between the liberal and conservative

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75. Let me be crystal clear: Whatever other political judgments about them are warranted, this paper and presentation do not address criticisms of the judiciary launched from the President's Twitter account, nor to what degree those criticisms amount to any serious assault on judicial independence. Cf. Jefferson B. Sessions III, *Reflections on Judicial Independence*, FEDERALISM & SEPARATION OF POWERS PRAC. GRP. NEWSL. (May 1, 1998), <http://www.fed-soc.org/publications/detail/reflections-on-judicial-independence> (addressing the critiques of judicial decisions by American politicians).

76. Cf. THE FEDERALIST NO. 78, *supra* note 14, at 464 (Alexander Hamilton) (explaining that the judiciary "may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments").

77. Joseph L. Rauh, Jr., *An Unabashed Liberal Looks at a Half-Century of the Supreme Court*, 69 N.C. L. REV. 213, 214 (1990).

78. *Id.* at 215.

blocs enough to earn the nickname “the man on the flying trapeze.”<sup>79</sup> In 1935 and 1936, the Supreme Court invalidated several portions of President Franklin Delano Roosevelt’s New Deal, including the National Recovery Act, the Agricultural Adjustment Act, the Railroad Retirement Act, and the Bituminous Coal Act.<sup>80</sup>

Then came Roosevelt’s dominating reelection in 1936, in which he won all but two states and over 60 percent of the popular vote.<sup>81</sup> Before his reelection, President Roosevelt had determined that his “Congressional program” was “fairly completely undermined” by the Supreme Court’s opinions and that “the language and temper of the decisions indicated little hope for the future.”<sup>82</sup> “Just as President Jefferson had in 1801 trained his sights on the Federalist members of the Supreme Court, Roosevelt planned to use his immense political resources to bring the Court into step with the President and Congress.”<sup>83</sup> In February 1937, Roosevelt proposed a convoluted reorganization of the Supreme Court, in which the president would be permitted to appoint an additional justice to the Supreme Court for each justice who stayed in office past the age of seventy.<sup>84</sup> President Roosevelt initially defended the plan on the basis that older justices could not carry a full workload for the court.<sup>85</sup> But this defense of the plan was disputed easily by Chief Justice Hughes’s statistical evidence that the Supreme Court had kept up with its workload.<sup>86</sup>

Robert Jackson, an Assistant Attorney General and future Supreme Court Justice himself, presented a more compelling argument for the court-packing plan. Jackson pointed out that Congress had previously increased and decreased the number of justices in the Supreme

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79. *Id.*

80. *Id.*

81. See Sidney M. Milkis, *Franklin Delano Roosevelt 1933–1945*, in *THE AMERICAN PRESIDENTS: CRITICAL ESSAYS* 416 (Melvin I. Urofsky ed., 2000).

82. Stephen R. Alton, *Loyal Lieutenant, Able Advocate: The Role of Robert H. Jackson in Franklin D. Roosevelt’s Battle with the Supreme Court*, 5 *WM. & MARY BILL RTS. J.* 527, 535 (1997).

83. Rehnquist, *supra* note 25, at 592.

84. *Id.* at 592–93.

85. *Id.* at 593.

86. *Id.*

Court.<sup>87</sup> For example, the Judiciary Act of 1801 decreased the size of the Supreme Court from six justices to five justices, preventing Jefferson from appointing a justice to the Supreme Court until two Federalist justices retired or resigned.<sup>88</sup> According to Jackson, Congress's ability to alter the size of the Supreme Court was "validated by historical practice as a method of bringing the elective and nonelective branches of the Government back into a proper coordination."<sup>89</sup> Regardless of the historical precedent supporting Jackson's arguments in 1801, his proposed "coordination" of the Supreme Court to the political branches by Congress would have been a severe blow to the institutional independence of the Court. After all, the essence of the court-packing plan was to alter the structure of the Supreme Court in order to bring the institution in line with the Democrats (not to mention the implicit pressure the plan placed on Supreme Court justices to forego life tenure).<sup>90</sup>

Opponents of the court-packing plan highlighted that it was intended plainly to punish the Supreme Court for opinions that the administration disliked.<sup>91</sup> These opponents insisted that an attack on judicial independence led to the forms of autocracy prevented by the Constitution.<sup>92</sup> Additionally, they noted that the American constitutional system had been designed with checks and balances intended to prevent one branch of government from subjugating another branch—and this constituted a particular risk to the judiciary, as Alexander Hamilton highlighted in *The Federalist Papers*.<sup>93</sup> Those who opposed the plan also attacked the wisdom of the precedents cited by the Roosevelt administration, such as an 1866 law that reduced the size of the

87. Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 274 (2017).

88. Act of Feb. 13, 1801, ch. 4, § 3, 2 Stat. 89 (repealed 1802).

89. Bradley & Siegel, *supra* note 87, at 274 (citation omitted).

90. *See id.* (explaining that Roosevelt administration officials believed that adding more justices to the Supreme Court was a constitutional method for "addressing the Court's resistance to the New Deal").

91. William E. Leuchtenburg, *FDR's Court-Packing Plan: A Second Life, A Second Death*, 1985 DUKE L.J. 673, 675 (citation omitted) (discussing the Senate Judiciary Committee's Report against the proposal).

92. *Id.*

93. Bradley & Siegel, *supra* note 87, at 275.

Supreme Court from ten members to seven members in order to prevent President Andrew Johnson from appointing a justice.<sup>94</sup>

Defeating the court-packing plan looked to be an uphill battle against an administration that seemingly held all the chips. On its face, the task appeared even more daunting than the Federalists' battle to save Justice Chase. Democrats possessed a four to one margin in the House of Representatives and held eighty of the ninety-six Senate seats.<sup>95</sup> But not all Democrats supported the court-packing plan. Chief Justice Hughes enlisted Democratic Senator Burton Wheeler of Montana to lead the opposition to Roosevelt's bill in the Senate.<sup>96</sup> Wheeler fought the bill in the Senate Judiciary Committee, which issued a report against the court-packing bill in June 1937.<sup>97</sup> That report was signed by seven Democratic senators.<sup>98</sup>

The Supreme Court took some actions that eased public opposition towards the Court. First, the Supreme Court decided to uphold some important pieces of New Deal legislation.<sup>99</sup> The Supreme Court's jurisprudence reflected a turn towards accepting legislative determinations of appropriate social and economic policy. This move became known as "the switch in time that saved nine."<sup>100</sup> Second, Justice Willis Van Devanter retired at the end of the 1936–37 term,<sup>101</sup> and President Roosevelt was able to appoint Alabama's own Hugo Black, a former Klan member,<sup>102</sup> but a justice friendly to the New Deal, in his stead. By June 1937, public support for the court-packing proposal had fallen from 49 percent to 41 percent.<sup>103</sup>

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94. *Id.* at 271–72, 274–75.

95. Rehnquist, *supra* note 15.

96. *Id.*

97. Alton, *supra* note 82, at 604.

98. Leuchtenburg, *supra* note 91, at 675.

99. Rehnquist, *supra* note 25, at 593 & n.52 (referring to *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)).

100. *Id.* at 593–94.

101. *Id.* at 594.

102. William H. Pryor Jr., *The Murder of Father James Coyle, the Prosecution of Edwin Stephenson, and the True Calling of Lawyers*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 401, 407 (2006).

103. Barry Cushman, *Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s*, 50 BUFF. L. REV. 7, 69 n.339 (2002) (citing an April



Despite public opposition, Roosevelt's court-packing plan nearly passed through the Senate in an amended form. The amended bill allowed the president to appoint one additional justice per year if a member of the Supreme Court had reached the age of seventy-five.<sup>104</sup> This amendment did little to change the political goals of the court-packing bill (or the implicit threat to lifetime tenure), but Democrats began to move towards favoring judicial reform. One senator estimated that fifty-two senators would support this amended bill, and the Senate's majority leader strongly pushed for Democrats to approve it.<sup>105</sup> But the majority leader died during the Senate's deliberations on the amended court-packing bill, and President Roosevelt lost support for the bill while the Senate was in recess.<sup>106</sup> The amended court-packing bill was withdrawn by the Senate, but not before its initial sponsor confirmed that "[t]he Supreme Court is out of the way."<sup>107</sup> After the failure of this bill, public support for changing the size of the Supreme Court faded, and over 60 percent of individuals polled in April 1938 supported a constitutional amendment to set the size of the Supreme Court at nine justices.<sup>108</sup>

The court-packing bill and its surprising failure marked the most significant conflict between the executive and judicial branches in the Supreme Court's history. Indeed, during the remainder of the twentieth century, the executive branch largely supported the federal courts' decisional and institutional independence. Famously, the Eisenhower and Kennedy administrations enforced the school desegregation decrees issued following *Brown v. Board of Education*.<sup>109</sup> Less well known is that the Department of Justice testified against several proposed statutes that would have deprived the federal courts of jurisdiction to address certain controversial issues. For example, during President Eisenhower's administration, his Attorney General testified

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1937 poll that showed 49 percent approval and 51 percent disapproval for the plan); Leuchtenburg, *supra* note 91, at 676 (citing a poll issued on June 20, 1937).

104. Leuchtenburg, *supra* note 91, at 680.

105. *See id.* at 681–82.

106. *See id.* at 685–87 (noting that many senators had supported the plan only because of the majority leader's efforts).

107. *Id.* at 689.

108. Cushman, *supra* note 103, at 72.

109. 347 U.S. 483 (1954).

against a bill that would have eliminated the Supreme Court's jurisdiction over cases involving "subversive activity" by suspected Communists.<sup>110</sup> President Carter's Attorney General opposed a proposal to strip federal jurisdiction to hear cases involving school prayer.<sup>111</sup> Likewise, President Reagan's first Attorney General, William French Smith, filed a letter opposing Congressional efforts to strip jurisdiction over school prayer cases, even though President Reagan himself supported the constitutionality of in-school prayer.<sup>112</sup> Attorney General Smith acknowledged that the Constitution provided Congress power to regulate the Supreme Court's appellate jurisdiction but insisted that a bill stripping the court of a core function would damage the Court's role "as an independent and equal branch."<sup>113</sup> Smith argued for using litigation "to urge the courts not to intrude into areas that properly belong to the State legislatures and to Congress."<sup>114</sup> By defending federal courts' jurisdiction over controversial cases, the executive branch has provided an important gloss to decisional independence in federal courts. Not only can a judge not be impeached due to his or her unpopular opinion, but in addition, the judge's court cannot lose jurisdiction because of an unpopular opinion.

## V. STATE ATTACKS ON JUDICIAL INDEPENDENCE

State governments have limited power to affect the independence of the federal judiciary. After all, they do not control the judiciary's purse or a judge's right to hold office. Nor, following the Seventeenth Amendment, can a state legislature that is upset with the

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110. See Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250, 276–78 (2012) (discussing the Attorney General's opinion that "unimpaired appellate jurisdiction" was needed for the Supreme Court to create consistent law).

111. See *id.* at 279–80 (discussing the Attorney General's concerns that stripping jurisdiction over constitutional claims would be unwise and might conflict with the Supreme Court's "essential role" to create uniform constitutional law).

112. See *id.* at 281–83.

113. 128 Cong. Rec. 9093 (1982) (letter from William French Smith, Att'y Gen, to Sen. Strom Thurmond, Chairman, S. Comm. on the Judiciary).

114. *Id.* at 9094.

federal judiciary appoint senators and direct them to challenge the judiciary while in Congress.<sup>115</sup> Indeed, challenges to the federal judiciary by state governments tend to be less concerned with judicial independence and more with contesting the principle of judicial supremacy asserted by the Supreme Court.<sup>116</sup> Nevertheless, it is worthwhile to end this essay with a historical look back at how states have affected (or attempted to affect) federal judges' independence and judicial authority.

The Supreme Court created a skirmish with the state governments within the first three years of its existence. In 1793, in *Chisholm v. Georgia*,<sup>117</sup> the Court considered whether a state could be sued by a citizen of another state in the Supreme Court. A South Carolina citizen had sued Georgia in the Supreme Court for recovery of a debt incurred by Georgia commissioners during the Revolutionary War.<sup>118</sup> The Georgia legislature had refused to pay the debt.<sup>119</sup> Before the enactment of the Constitution, sovereign immunity had protected states from being sued in their own state courts without consent of the state government.<sup>120</sup> But, four of the five justices presiding in *Chisholm* held that the Supreme Court could exercise jurisdiction in a suit filed against a state by a citizen of a different state.<sup>121</sup> Two days after the Supreme Court's decision in *Chisholm*, an amendment to the Constitution was proposed to bar suits against a state by citizens of another state or a foreign country.<sup>122</sup> Georgia's legislature began working on a similar amendment.<sup>123</sup> Congress approved the Eleventh Amendment

115. See U.S. CONST. amend. XVII (requiring that senators be elected directly by the people of their state).

116. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 4 (1958) (involving the Governor and Legislature of Arkansas contesting that they were not bound by the Supreme Court's holding in *Brown v. Board of Education*, 347 U.S. 483 (1954) until its state laws had been challenged in the courts).

117. 2 U.S. (2 Dall.) 419, 420 (1793).

118. See Doyle Mathis, *Georgia Before the Supreme Court: The First Decade*, 12 AM. J. LEGAL HIST. 112, 115–17 (1968) (describing the history of the debt and the unsuccessful case that the plaintiff had brought in a federal district court).

119. *Id.* at 116.

120. *Id.* at 117.

121. *Id.* at 118.

122. See Jacobs, *supra* note 4, at 22 (quoting the proposed amendment).

123. *Id.* at 28–29.

in March 1794, and the requisite number of states ratified it by February 1795.<sup>124</sup>

Such a quick reaction against the Supreme Court's assertion of jurisdiction over sovereign states could be interpreted as a loss of judicial independence for the fledgling Supreme Court. But this interpretation is questionable, at best, because many commentators thought that the Constitution had not abrogated sovereign immunity as it had been applied in the pre-Constitution era.<sup>125</sup> More importantly for purposes of this essay, the passage of the Eleventh Amendment reflected Congress's acute sensitivity to a Supreme Court opinion that had controversially reduced the power of the states.<sup>126</sup> Congressional responses to Supreme Court decisions that restrict the power of the states can be seen throughout many eras of the republic's history and must be viewed through a different lens. Indeed, Congress's proposals to prevent Supreme Court review of school prayer were intended to return that constitutional issue to state courts and arguably would have allowed a diversity of case law on this hot-button issue. Those attempts in the 1970s were plainly non-starters. In the end, the passage of the Eleventh Amendment is more properly viewed as an early calibration—driven by policies related to comity and federalism—of an embryonic nation's constitutional framework.

## VI. CONCLUSION

The United States has seen a broad variety of proposals by Congress and the President to reduce judicial independence, apart from the day-to-day critiques of particular decisions by politicians and pundits. Those expressions are well within the First Amendment rights of those

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124. *Id.* at 19 & n.2. The amendment was adopted officially in 1798. *Id.* at 19 n.2.

125. *See, e.g., Alden v. Maine*, 527 U.S. 706, 716–18 (1999) (citing statements and writings by Alexander Hamilton, James Madison, and John Marshall prior to the adoption of the Eleventh Amendment that argued for the proposition that the Constitution preserved the states' traditional immunity from private suits).

126. *See Jacobs, supra* note 4, at 19 n.2, 22 (asserting that a constitutional amendment regarding *Chisolm* was introduced in the Senate two days after the Supreme Court's decision and that the Eleventh Amendment was overwhelmingly approved by the House of Representatives and the Senate).

politicians and pundits. Some political attacks on judicial independence were petty and defeated by wiser political forces. Others, such as President Roosevelt's court-packing scheme, were plainly designed to interfere with the courts and bring about political change. And still others, such as the Eleventh Amendment, were necessary to address concerns about judicial overreach. Despite these political attacks on the judicial branch's decisional and institutional independence, the United States has enjoyed the benefits of a judiciary that has been both independent and generally aware of its structural limitations—a judiciary that is far from powerless, but appropriately still the weakest branch. Will current day judges, in this polarized cultural and political environment in which we find ourselves, continue to maintain this crucial balance? That must be the subject of another paper.

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