# Articles

# CONGRESSIONAL THREATS OF REMOVAL AGAINST FEDERAL JUDGES

By: Marc O. DeGirolami*

The apparent state of relations [between Congress and the judiciary] is more tense than at any time in my lifetime.[1]

The federal judicial branch has lately become the object of increasing scrutiny and distrust by its legislative counterpart. Congressional suspicion is often directed toward judicial discretion in criminal sentencing and, more generally, the degree to which judges are perceived to be beholden to a particular ideological point of view or personal bias. This distrust has bred a potent strain of political opportunism that Congress has manifested in several recent bills. One of these, the Feeney Amendment to the PROTECT Act,[2] all but eliminated judicial discretion in sentencing and tacitly threatens judges' continued employment. Though the Supreme Court's recent decision in *United States v. Booker*[3] invalidates certain sections of the Feeney Amendment and appears (for the moment) to vest significant sentencing discretion back in the judiciary, that decision has already inflamed congressional ire[4] and will only

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* Law Clerk, Hon. Jerome Farris, U.S. Court of Appeals for the Ninth Circuit, 2004–05; Hon. William E. Smith, U.S. District Court, District of Rhode Island, 2003–04; J.D., Boston University School of Law; M.A., Harvard University; B.A., Duke University. I thank Judge William E. Smith, Magistrate Judge Robert W. Lovegreen, and Professor David M. Zlotnick for their insights and comments, and Raymond M. Ripple and Christos Kolovos for their reviews of early drafts. I also thank my wife Lisa for her editorial prowess and support. The views expressed in this article are solely mine and in no way represent those either of my employers or of the federal judiciary.

1. Hon. Sandra Day O'Connor, Address at 2004 Ninth Circuit Conference (July 22, 2004), *quoted in* Jeff Chorney, *O'Connor: Make Nice with Congress*, THE RECORDER, July 23, 2004, at 1.

2. Pub. L. No. 108-21, 117 Stat. 650, 667–76 (2003) (codified at 18 U.S.C. § 3742 (2004)).

3. 125 S. Ct. 738 (2005).

4. *See* Carl Hulse & Adam Liptak, *New Fight Over Controlling Punishments Is Widely Seen*, N.Y. TIMES, Jan. 13, 2005, at A29 ("Republicans on the House Judiciary Committee led the successful effort last year to require the United States Sentencing Commission to provide Congress with the names of federal judges who broke from the guidelines. Representative Tom

strengthen Congress's resolve to enforce vigorously the surviving portions of the Feeney Amendment to maximize its control over the judiciary. Similarly, Congress is considering legislation that would disavow citation in judicial opinions to foreign legal sources.[5] The consequences to maverick judges who disregard the congressional will about what should not be written into American case law are not yet clear, but some in the House of Representatives have already suggested that removal from office is a distinct and viable possibility.[6] There are frequent calls, particularly from certain voices in the House, for "judicial accountability" for decisions that are controversial, politically debatable, or otherwise purportedly not in keeping with popular opinion.[7]

The natural progression of these tendencies may or may not be toward more frequent impeachment of federal judges; the central claim of this article is that it is nevertheless probable that the future holds more threats of removal.[8] This article explores the use of threats of removal against federal judges and why their incidence is likely to increase. In Part I, after presenting the textual sources authorizing judicial removal, I survey briefly the history and quality of certain judicial impeachments and threatened removals. In Part II, I examine two recent pieces of legislation, the Feeney Amendment

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Feeney, the Florida Republican who wrote that provision, called the court ruling [in *Booker*] an 'egregious overreach.'"). The possible impact of *Booker* on inter-branch relations is explored *infra* notes 93–108 and accompanying text.

5. H.R. Res. 568, 108th Cong. (2004).

6. *See* Tony Mauro, *Rehnquist Tries to Build Bridges with Congress; Critics in the House, However, Vow to Continue Their Scrutiny of the Judiciary*, LEGAL TIMES, May 31, 2004, at 1.

7. *See infra* notes 192–203 and accompanying text.

8. A few snapshots of recent events (in March of 2004 alone) are illustrative. *See, e.g.*, Tom Curry, *A Flap over Foreign Matter at the Supreme Court: House Members Protest Use of Non-U.S. Rulings in Big Cases*, MSNBC NEWS, *available at* www.msnbc.msn.com/id/4506232 (Mar. 11, 2004) (quoting Florida Congressman Tom Feeney as saying that "[t]o the extent [that the Supreme Court] deliberately ignore[s] Congress' admonishment, they are no longer engaging in 'good behavior' in the meaning of the Constitution and they may subject themselves to the ultimate remedy, which would be impeachment"); Sensenbrenner Remarks Before the U.S. Judicial Conference Regarding Congressional Oversight Responsibility of the Judiciary, U.S. House of Representatives, *at* http://judiciary.house.gov/newscenter.aspx?A=409 (Mar. 16, 2004) (printing the comments of House Judiciary Committee Chairman F. James Sensenbrenner, Jr., who observed that judges' decisions not in accord with legislative views "raise[] profound questions with respect to whether the Judiciary should continue to enjoy delegated authority to investigate and discipline itself. If the Judiciary will not act, Congress will . . . ." Sensebrenner also noted, "[A]rticles of impeachment against federal judges stemming from their conduct on the bench have led to both impeachment by the House and trial and conviction in the Senate and removal from office on several occasions.").

This article will focus primarily on threats to remove federal judges, though state judges are not immune from these types of attacks. *See, e.g.*, Raphael Lewis, *Foes of Gay Marriage Try Long Shot; Bill Seeks to Remove Four of SJC's Justices*, BOSTON GLOBE, Apr. 20, 2004, at B1 (reporting that Massachusetts State Representative Emile J. Goguen planned to introduce a bill to remove four Massachusetts Supreme Judicial Court Justices "as a tool to pressure members of the court to reconsider their landmark 4-3 decision or risk losing their judgeships").

and House of Representatives Resolution 568 (which has not yet been enacted), that serve as able vehicles for legislators to threaten judges with removal for noncompliance with certain political ideologies or objectives. In Part III, I ask what may explain the increased prevalence of threats of removal by legislators against judges. In answer, I advance two theories, the first of which posits that the threat of judicial removal is a perfectly rational choice for legislators given the power structure between the branches as it has developed in modern times; therefore, such threats will become an increasingly frequent occurrence even though they are not necessarily followed by impeachment. The second explanatory theory is based on the growing public perception (from within and outside the legal profession) of the judiciary as incapable of credibly performing its judging function. I argue that some of the traditional beliefs about the role of judges have been irremediably undermined by a culture that deems criticism, in as great an abundance as possible, a paramount virtue. I submit that the legislature has capitalized on both the popularity of judicial criticism and the lack of public confidence in the judiciary to advance its own political ends. These two theories, working in conjunction, provide a basis for understanding the increased incidence of legislative threats of removal against judges and for the belief that the present socio-political climate will conduce to more frequent and forceful threats of removal in the future. After considering and rejecting several commonly voiced remedies for the current state of congressional and public hostility toward the judiciary, I conclude in Part IV that the relationship between the legislative and judicial branches will continue to deteriorate, and that congressional threats of removal will play an increasingly central role in this dissolution.

## I. THE CONSTITUTIONAL TEXT AND ITS USE

The authority to remove a federal judge from office traditionally has been interpolated from (as it is not expressly located in)[9] two characteristically vague constitutional provisions: (1) All "civil Officers of the United States" are to be "removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors"[10]; and (2) federal judges "shall hold their Offices during good Behaviour."[11] The Constitution sets out no other particulars with respect to these sections, but does add in Article III that the "Trial of all Crimes, except in Cases of

9. *See* Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 213 (1993).

10. U.S. CONST. art. II, § 4.

11. U.S. CONST. art. III, § 1.

Impeachment, shall be by Jury."[12] There are no other constitutional details governing the conditions under which a federal judge may be removed.[13]

Moreover, Congress has never undertaken, by act, constitutional amendment, or otherwise, to define the phrase "good behaviour."[14] It has likely never been one of Congress's priorities. The impeachment armamentarium has been brought to bear infrequently: from 1799 to the present, only seventeen persons have been tried by the Senate on impeachment charges brought by the House, and only seven of those were removed from office.[15] Of those seventeen, however, thirteen—76%—have been federal judges, and all seven of the removals were federal judges.[16] Moreover, the House of Representatives has initiated fifty-eight judicial investigations of

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12. U.S. CONST. art. III, § 2, cl. 3. The process of impeachment is administered by both Houses of Congress. The House of Representatives is vested with the power of impeachment. U.S. CONST. art. I, § 2, cl. 5. This is the process by which the articles of impeachment are formulated (as in an indictment by a grand jury) and voted on (a simple majority suffices). The House's vote to impeach catalyzes the Senate's "sole Power" to try impeachments, along with its power to convict with the "Concurrence of two thirds of the Members present." U.S. CONST. art. I, § 3, cl. 6.

13. Of course, I am speaking here only of Article III judges. Various statutes authorize the removal of judges receiving their power under Article I. *See, e.g.*, 26 U.S.C. § 7443(f) (2004) (judges of the Tax Court); 38 U.S.C. § 7253(f) (2004) (judges of the Court of Appeals for Veterans Claims); 10 U.S.C. § 942(c) (2004) (judges of the Court of Appeals for the Armed Forces); 28 U.S.C. § 631(i) (2004) (magistrate judges).

14. The "good behaviour" standard was a carryover from English law. William G. Ross, *The Hazards of Proposals to Limit the Tenure of Federal Judges and to Permit Judicial Removal Without Impeachment*, 35 VILL. L. REV. 1063, 1067 (1990). Judicial lifetime tenure, therefore, is not expressly required by the Constitution; it is merely inferable from the "good behaviour" standard. Michael J. Mazza, *A New Look at an Old Debate: Life Tenure and the Article III Judge*, 39 GONZ. L. REV. 131, 135 (2003); *see also* Michael J. Gerhardt, *Impeachment Defanged and Other Institutional Ramifications of the Clinton Scandals*, 60 MD. L. REV. 59, 75 (2001) (arguing that the framers used the "good behaviour" standard in order to "distinguish judicial tenure (life) from the tenure of elected officials (such as the president)").

15. Michael J. Gerhardt, *The Lessons of Impeachment History*, 67 GEO. WASH. L. REV. 603, 613–14 (1999). Professor Gerhardt indicates a count of 16, but his count does not include the impeachment of President Clinton.

16. The Senate has established a court of impeachment for the following federal judges: John Pickering, District Judge for the District of New Hampshire (1804) (removed from office); Samuel Chase, Associate Justice of the U.S. Supreme Court (1805) (acquitted); James H. Peck, District Judge for the District of Missouri (1830) (acquitted); West H. Humphreys, District Judge for the Middle, Eastern, and Western Districts of Tennessee (1862) (removed from office); Mark H. Delahay, District Judge for the District of Kansas (1872) (resigned after impeachment but before completion of the process); Charles Swayne, District Judge for the Northern District of Florida (1905) (acquitted); Robert W. Archbald, Associate Judge for the U.S. Commerce Court (1912) (removed from office); George W. English, District Judge for the Eastern District of Illinois (1926) (resigned, proceedings dismissed); Harold Louderback, District Judge for the Northern District of California (1933) (acquitted); Halsted L. Ritter, District Judge for the Southern District of Florida (1936) (removed from office); Harry E. Claiborne, District Judge for the District of Nevada (1986) (removed from office); Alcee L. Hastings, District Judge for the Southern District of Florida (1989) (removed from office); Walter L. Nixon, District Judge for the Southern District of Mississippi (1989) (removed from office). EMILY FIELD VAN TASSEL & PAUL FINKELMAN, IMPEACHABLE OFFENSES: A DOCUMENTARY HISTORY FROM 1787 TO THE PRESENT 91–185 (1999).

federal judges (the first official act in the impeachment process).[17] The two earliest judicial impeachment trials, those of Judge John Pickering and Justice Samuel Chase, give the first glimpse of the political practicalities of judicial removal. Judge Pickering's impeachment was motivated in large measure by his debilitating senility and alcoholism.[18] The four articles of impeachment leveled against him all related to his decisions in a particular case and included a charge that his deportment on the bench consisted of "ravings, cursings, and crazed incoherences."[19] The day after the removal of Judge Pickering for incompetence (and only nominally, by his Republican political adversaries, for high crimes and misdemeanors), eight articles of impeachment were brought against Justice Chase.[20] The majority of the charges against Chase were rooted in the perception of him (rightly, it seems) as "impatient, overbearing, and at times arrogant," but, with one notable exception, legal historians have emphasized the role of angry Jeffersonian Republicans in calling for his impeachment.[21] The charges against Chase related to his decisions while on the bench: in one case, preventing counsel from relying on relevant precedent; in another, refusing to excuse a juror who had prejudged the case; in a third, tampering with a grand jury; and in a fourth, delivering an inappropriate political speech to a jury.[22] Justice Chase was impeached by the House but acquitted by the Senate.[23]

It has been observed that the impeachment and acquittal of Justice Chase "set a precedent that no judge would ever be removed for high-handed decisionmaking."[24] An alternative view, however, is that the impeachment and acquittal of Justice Chase was the first

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17. Edward D. Re, *Article III Federal Judges*, 14 ST. JOHN'S J. LEGAL COMMENT. 79, 89 (1999).

18. *See* HON. WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 127 (1992). Nevertheless, Pickering was a Federalist appointee and therefore an easy target for the newly installed Republicans.

19. *See id.* (citing ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL, VOL. III, 165 (1919)); VAN TASSEL & FINKELMAN, *supra* note 16, at 93–95.

20. *See* David P. Currie, *The Constitution in Congress: The Most Endangered Branch, 1801–1805*, 33 WAKE FOREST L. REV. 219, 249–50 (1998).

21. REHNQUIST, *supra* note 18, at 22–23, 88. The exception is Raoul Berger, who believes that the charges against Justice Chase were sufficiently egregious to justify his removal. *See* RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 249–51 (1973).

22. *See* VAN TASSEL & FINKELMAN, *supra* note 16, at 103–07.

23. REHNQUIST, *supra* note 18, at 23, 104–05.

24. Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153, 169 (2003). This conclusion is somewhat weakened by the parallel precedent that federal judges, more than any other "civil Officers," overwhelmingly have been the primary targets of consummated impeachments whose charges related both to high-handed decisionmaking and to other objectionable conduct. Michael J. Gerhardt, *William H. Rehnquist's Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson*, 16 CONST. COMMENT. 433, 439 (1999) (book review).

threatened but not consummated removal—the prototypical congressional response to the kind of judicial conduct that, though perhaps not ultimately meriting removal in that it fails to qualify as a high crime or misdemeanor, is controversial enough to draw the ire of political enemies in Congress. One might characterize it as "bad behavior"—not impeachment-worthy but nevertheless deserving, in the eyes of disapproving legislators, of some direct reaction. The next impeachment, that of Judge James Peck, follows this model. Peck was charged with abuse of power for issuing a contempt citation against and imprisoning a lawyer who had criticized him in a newspaper for decisions in a particular case;[25] Peck, too, was impeached and acquitted.[26] Likewise, "[h]igh-handed decisionmaking was included among the articles of impeachment" against Judge Charles Swayne (abuse of the contempt power) and Judge George English ("willfully, tyrannically, and oppressively" disbarring lawyers).[27] Judge Swayne was impeached and acquitted and Judge English was impeached and resigned prior to his trial.[28] The next judicial impeachment, the case of Judge Harold Louderback, does not follow this model; Louderback was impeached for engaging in financial improprieties and for bringing the bench into disrepute; he was subsequently acquitted.[29]

Most interesting for understanding the implications of the "bad behavior" model is the comparatively recent case of Judge Harold Baer, Jr. In 1996, Judge Baer suppressed evidence of narcotics activity after finding that the police had conducted an illegal search,[30] and the government filed a motion for reconsideration shortly thereafter. In that election year, Baer's decision elicited an immediate and vehement response. More than two hundred members of Congress, led by Representatives Bill McCollum, Fred Upton, and Michael Forbes, wrote President Clinton decrying the decision and demanding that the President call for Judge Baer's resignation.[31] Former Senator Bob Dole, then the Republican presidential candidate, threatened Judge Baer with impeachment and

25. Geyh, *supra* note 24, at 169.

26. *Id.*

27. *Id.* at 169 n.45; VAN TASSEL & FINKELMAN, *supra* note 16, at 123–31, 147.

28. Geyh, *supra* note 24, at 169 n.45.

29. Michael J. Gerhardt, *Putting the Law of Impeachment in Perspective*, 43 ST. LOUIS U. L.J. 905, 921–22 & n.104 (1999); Jonathan Turley, *The Executive Function Theory, The Hamilton Affair, and Other Constitutional Mythologies*, 77 N.C. L. REV. 1791, 1832–33 (1999) ("The Louderback case reflected a trend of the House in investigating or impeaching officials for any conduct—official or unofficial—viewed as bringing an office 'into disrepute' or raising compelling questions of legitimacy.").

30. United States v. Bayless, 913 F. Supp. 232, 243 (S.D.N.Y. 1996), *vacated on reconsideration by* 921 F. Supp. 211 (S.D.N.Y. 1996).

31. *See* Jon O. Newman, *The Judge Baer Controversy*, 80 JUDICATURE 156, 157 (1997).

President Clinton (himself likely concerned about appearing "soft on crime") intimated that a forced resignation might be in the offing depending on the judge's disposition of the motion for reconsideration.[32] Judge Baer granted the motion.[33]

Judge Baer's situation does not strictly fit the model for "bad," but non-impeachable, behavior that nevertheless draws an angry congressional response because Baer was not impeached and then acquitted. However, Baer's decision to reverse himself created suspicion that he had been intimidated by threats of removal (or forced resignation) if he did not do so.[34] The incident also sparked the resurgence of friction between the judiciary and Congress about what conduct merits removal. Responding to a joint statement issued by the Second Circuit defending Judge Baer against threats of removal, former Senator Dole wrote:

> You offer your opinion that "[a] ruling in a contested case cannot remotely be considered a ground for impeachment." Again, I must take exception. Only a few years ago, the Supreme Court held that matters of impeachment are left by the Constitution to the political branches of the federal government and that the courts are powerless to review impeachment decisions. It is thus for the Congress to decide what constitutes a proper basis under the Constitution for impeaching federal judges.[35]

This statement is revealing in that it typifies Congress's present approach when faced with judicial conduct that may not be egregious enough for impeachment but nevertheless is felt to demand some forceful, critical response. Professor Gerhardt has written that:

> the Article III ["good behavior" clause] formula could sensibly be read either as (1) setting a substantive standard of conduct on which judicial tenure is contingent, or as (2) employing an eighteenth-century term of art to signal that federal judges shall hold tenure for life unless impeached, and, thus, that the good behavior clause itself does not establish a separate or

32. Gerhardt, *supra* note 14, at 74.

33. United States v. Bayless, 921 F. Supp. 211, 217–18 (1996).

34. Gerhardt, *supra* note 14, at 74; Thomas I. Vanaskie, *The Independence and Responsibility of the Federal Judiciary*, 46 VILL. L. REV. 745, 769 n.126 (2001) ("The implication that the threats of removal affected the judge's ruling is apparent.").

35. Newman, *supra* note 31, at 162–63 (quoting then Senator Dole's letter of April 9, 1996, to Judges Lumbard, Feinberg, Oakes, and Newman) (citation omitted).

> independent basis for removal other than those specified in the impeachment clauses.[36]

When confronted with likely unimpeachable but highly politically objectionable (for Dole) behavior, Dole made intentionally murky the type of conduct that would qualify for impeachment by emphasizing Congress's inviolable power to define such conduct at will. The implication of his position is an endorsement of Gerhardt's first alternative as the proper interpretation of the "good behavior" clause. In fact, the inherent ambiguity of the "good behavior" standard and its meaning for judicial tenure is a credible mechanism to support Congress's insistence that the possible grounds for impeachment are not capable of close definition and depend more on particular legislative whimsy.[37] Thus, while actually impeaching a judge remains as complicated and lengthy a process as ever, threatening a judge with impeachment, thereby imposing the full heft of political and public disapproval upon him, is both a viable and readily usable congressional instrument of control over the judiciary.[38] Whether or not Judge Baer (or anyone else) believed that he would be impeached based on his disposition of the motion for reconsideration in *Bayless*, he may well have felt that his job security and his ability to function as a judge had been compromised by the congressional threats against him.

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36. MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 83 (2d ed. 2000). Gerhardt goes on to conclude that the second alternative is more consistent with historical evidence. *Id.* at 83–86.

37. It is true that the weight of scholarly commentary concludes that the "good behavior" standard was not meant to increase the number of grounds for impeachment beyond those covered by "high crimes and misdemeanors"; these scholars believe that there is no difference between the grounds upon which elected officials and judges may be impeached. *See, e.g.*, GERHARDT, *supra* note 36, at 83–86; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 2-7, at 166 (3d ed. 2000). Nevertheless, the issue is not entirely resolved. *See, e.g.*, RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 103–04 (1999) (arguing that there are different standards for impeaching judges and elected officials); Geyh, *supra* note 24, at 164 (defining one of the elements of "[d]octrinal [judicial] independence" as requiring that Congress "not remove judges during good behavior"). Since it is in Congress's interest to keep the grounds for judicial impeachment deliberately vague, credible threats of impeachment may be made against judges for any number of reasons not technically within the purview of the "high crimes and misdemeanors" clause.

38. It is for this reason that I do not agree with Professor Gerhardt's claim that "[t]he threat of impeachment no longer seems to carry the stigma it once did." Gerhardt, *supra* note 14, at 77. Gerhardt contends that the cumbersomeness of impeachment proceedings is inconsistent with the modern-day public's short attention span and the numerous constraints on legislators' time. I agree that commencing and carrying through to completion an impeachment and conviction may be less feasible today than in the past. But threatened removals, which have none of the problems identified by Gerhardt, have, in fact, become easier and more frequent (some of the reasons for this are described in Part III(B)), just as consummated impeachments have become more difficult. *See* Frank B. Cross, *Thoughts on Goldilocks and Judicial Independence*, 64 OHIO ST. L.J. 195, 205–06 (2003) ("Although Congress rarely removes judges from office, threats of impeachment are fairly common.").

## II. RECENT LEGISLATION THAT ENABLES CONGRESSIONAL THREATS OF REMOVAL

As the previous section demonstrates, the meaning of "good behavior" and its role in defining the scope of impeachable conduct has proven notoriously elusive. The amorphous moral qualities adumbrated by the phrase put in one's mind the colorful statements of the Roman historian Tacitus, who in relating the impeachments of A.D. 57, described those convicted as "stained with the foulest guilt," "audacious[ly] wicked[]," and "supported by corrupt influence."[39]

Of course, incompetence in the fulfillment of one's juridical duties, as we have seen in the example of Judge Pickering, is grounds for removal.[40] And few would dispute that bribery, extortion, and embezzlement of public funds are all examples of impeachable behavior.[41] The grayer shades come into focus when one considers an act that arguably violates "public rights and duties" owed to society at large,[42] or "which in some way corrupt[s] or subvert[s] the political and governmental process," or which is "plainly wrong in [itself] to a person of honor, or to a good citizen."[43] With time, the frustrations and uncertainties of sorting out the ethical and semantic nuances suggested by these phrases may well lead to cynicism[44] or, as explored below, political opportunism.

In part because of the absence of distinct and well-defined standards for assessing the "goodness" or "badness" of a judge's professional conduct, it has been possible for Congress to craft

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39. TACITUS, THE ANNALS AND HISTORIES, Book XIII, ch. 33 (Alfred John Church & William Jackson Brodribb trans., The Modern Library Classics 2003).

40. Even Plato speaks disparagingly of judges who fall asleep in open court. *See* PLATO, THE REPUBLIC 147 (H. D. P. Lee trans., Penguin Classics 1955) ("[H]ow far better it is to arrange one's life so that one has no need of a judge dozing on the bench.").

41. *See* Maria Simon, Note, *Bribery and Other Not So "Good Behavior": Criminal Prosecution as a Supplement to Impeachment of Federal Judges*, 94 COLUM. L. REV. 1617, 1637 (1994).

42. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *2.

43. CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK 37 (1974). A similarly complicated framework for understanding what is impeachment-worthy classifies impeachable behavior into two sub-genera: The conduct "must violate some known, established law, be of a grave nature, and involve consequences highly detrimental to the United States. In the alternative, it must involve evil, corrupt, wilful, malicious or gross conduct in the discharge of office to the great detriment of the United States." John D. Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 FORDHAM L. REV. 1, 54–55 (1970). But acts that "result from error of judgment or . . . from the misconception of duty, without the presence of a willful disregard, are not impeachable." *Id.* at 55.

44. See, for example, the well-known comment of then U.S. Representative Gerald R. Ford, on the merits of the possible impeachment of Justice William O. Douglas: "[A]n impeachable offense is whatever a majority of the House of Representatives considers [it] to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office." 116 CONG. REC. 11,913 (1970).

legislation that substantially affects judicial power and discretion and that also either itself tacitly threatens judges with removal for noncompliance or provides a platform for individualized and systematic threats of removal by legislators. The Feeney Amendment and House of Representatives Resolution 568 are two examples of such legislation.

## A. THE FEENEY AMENDMENT AND ITS MINATORY PROVISIONS

The Sentencing Reform Act of 1984[45] (SRA) and the Federal Sentencing Guidelines[46] are certainly nothing new, and it is undisputed that two of the primary motivations underlying the Guidelines were the promotion of uniformity in sentencing and the creation of sentences proportionate to the crimes committed.[47] The Guidelines themselves support these aims.[48] Notwithstanding the substantial curtailment of judicial discretion in sentencing ushered in by the Guidelines, Judge Bruce Selya has observed that even under the SRA

> sentencing is not a matter of mere mechanics. The various adjustments to the base offense level for specific

45. Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

46. The Guidelines were created by the United States Sentencing Commission, whose power emanates from Congress. *See* Mistretta v. United States, 488 U.S. 361, 364, 371–72, 412 (1989) (holding that Congress's delegation of legislative power to the Commission to create the Guidelines is constitutional).

47. *See Oversight of the U.S. Sentencing Commission: Hearing Before the Subcomm. on Judiciary Criminal Justice Oversight, Senate Comm. on the Judiciary,* 106th Cong. (2000) (statement of Sen. Strom Thurmond, Chairman, Senate Subcomm. on Judiciary Criminal Justice Oversight) (stating that elimination of sentence disparity between similarly situated defendants was a primary purpose of Guidelines); Hon. Bruce M. Selya & John C. Massaro, *The Illustrative Role Of Substantial, Assistance Departures in Combating Ultra-Uniformity*, 35 B.C. L. REV. 799, 801 (1994) (discussing proportionality as an aim of the Guidelines).

48. *See* U.S. SENTENCING GUIDELINES MANUAL § 1A1.1, introductory cmt. (2004) (emphasis added):

> To understand these [G]uidelines and the rationale that underlies them, one must begin with the three objectives that Congress, in enacting the new sentencing law, sought to achieve. Its basic objective was to enhance the ability of the criminal justice system to reduce crime through an effective, fair sentencing system. To achieve this objective, Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arises out of the present sentencing system which requires a judge to impose an indeterminate sentence that is automatically reduced in most cases . . . .
>
> Second, Congress sought uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity.

> offense characteristics and other factors depend upon a district court's determination of what conduct is relevant to the offense at issue—a matter inviting district court discretion . . . . Similarly, district court discretion is summoned, like a genie from a bottle, by the long list of factors to be considered in imposing a particular sentence, and by the somewhat elastic contours of those factors. Finally, the departure provisions introduce play in the joints of the guidelines structure.[49]

It seems plausible that the SRA and the Guidelines stemmed in large measure from the reasonable legislative impetus to promote consistency and diminish individual caprice in federal sentencing. Those laudable purposes were tempered, however, by provisions of the SRA permitting judges, in the (regulated) exercise of their discretion, to depart (upward or downward) from the Guidelines' range for various case-specific reasons.[50] Some of these reasons were expressly deemed legitimate in all situations,[51] while others depended on ad hoc judicial assessments. Appellate courts were empowered to review sentencing departures and overturn them if "unreasonable,"[52] which the Supreme Court interpreted as appellate review for abuse of discretion.[53]

The advent of the Feeney Amendment, however, calls into doubt whether the motivations of Congress today in controlling the sentencing process bear much resemblance to those of the Congress that enacted the SRA in the mid-1980s. The Feeney Amendment (named after its sponsor, then-first term Representative Tom Feeney of Florida, "who it appears had never before expressed any interest or insight into sentencing, federal or otherwise"[54]) was enacted as part of the Prosecutorial Remedies and Tools Against the Exploitation of Children Today (PROTECT) Act (or "Amber

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49. Selya & Massaro, *supra* note 47, at 803.

50. *See, e.g.*, 18 U.S.C. § 3553(b) (2004) (permitting departure if "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described"); U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (explaining the importance of Guidelines departures and highlighting the continuing importance of judicial discretion in the context of departures).

51. *See, e.g.*, 28 U.S.C. § 994(n) (2004) (directing the Commission to "assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed . . . to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense").

52. *See* 18 U.S.C. § 3742(f)(2) (2004).

53. Koon v. United States, 518 U.S. 81, 98–100 (1996) ("A district court's decision to depart from the Guidelines . . . will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court.").

54. Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1241 (2004).

Alert"),[55] whose essential purpose, the creation of a national reporting system for child kidnappings, has little obvious connection with regulating or curtailing the powers of the judiciary.[56]

Nevertheless, the Feeney Amendment represents the greatest restriction of judicial sentencing power since the SRA.[57] The Feeney Amendment passed through two incarnations. The first version (Feeney I) was attached, without any vetting by the House Judiciary Committee, the Sentencing Commission, or anyone else in Congress (or the judiciary), as a rider to the PROTECT Act and was passed by the House of Representatives with little discussion.[58] Feeney I dispensed with certain express grounds for downward departure (e.g., aberrant behavior, family ties, military service, educational or vocational skills, mental or emotional conditions, employment record, good works, and overstated criminal history).[59] It also eliminated the ad hoc category of downward departure, limiting the grounds for departure to those selected factors explicitly listed in the Guidelines.[60] Professor David Zlotnick has observed that Feeney I's wholesale abolition of judicial discretion in sentencing may well have been catalyzed by the "Judge Rosenbaum Debacle."[61] But the confrontation between the House Judiciary Committee and Judge Rosenbaum was merely symbolic of the long-standing and pervasive suspicions of several in the Committee and in Congress generally that too many judges are "soft on crime" and overly prone to depart downward.[62] Those suspicions created an opportunity for Congress to assert its power over the judiciary by implementing new rules that, as I will argue below, tacitly threaten judges' job security.

The enacted version of the Feeney Amendment (Feeney II) eliminated judicial discretion with respect to unenumerated

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55. Pub. L. No. 108-21, 117 Stat. 650, 667–676 (2003) (codified at 18 U.S.C. § 3742 (2004)). The Feeney Amendment appears at section 401 of the PROTECT Act.

56. See the statement of Senator Edward Kennedy (MA), expressing the view that the Feeney Amendment "ha[s] nothing to do with protecting children, and everything to do with handcuffing judges and eliminating fairness in our Federal sentencing system." 149 CONG. REC. S6711 (daily ed. May 20, 2003).

57. *See* Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295, 295 (2004) ("Congress has come close to a drive-by rewrite of sentencing law, and a sentencing revolution may still be in the works.").

58. *See* H.R. REP. NO. 108-48 (2003) (limiting discussion of the Feeney Amendment to 20 minutes).

59. 149 CONG. REC. 3059 (2003).

60. *See* David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211, 230 (2004).

61. *Id.* at 227–28. U.S. District Judge James M. Rosenbaum of Minnesota, a Reagan appointee and former U.S. Attorney, offered various criticisms of drug sentences under the Guidelines before the House Judiciary Committee. In response, he was accused by the Committee of disregarding the Guidelines on several occasions and was threatened with a records subpoena. *Id.*

62. *Id.* at 226.

downward departures for crimes involving pornography, sexual abuse, child sex, and child kidnapping and trafficking.[63] It also made several substantive changes to sentencing practice as it had developed under the SRA, imposing two categories of limitations on judicial discretion which I will call "direct" and "minatory." The "direct" limitations were the substitution of de novo appellate review of departures for *Koon*'s abuse of discretion standard[64] and the requirement that a prosecutor make a motion for the last point in a three-level reduction for acceptance of responsibility.[65] To be sure, these restrictions weaken the discretionary power of judges, but they have few psychological overtones or implications. The de novo standard of review expressed a preference for greater intra-judicial scrutiny of downward departures; it might have resulted in more reversals merely because appellate judges would have been freer to do their own bidding. Whether or not that actually occurred, the district judge was merely on notice that his sentencing decisions, like the majority of his decisions in other contexts (e.g., rulings on dispositive motions and essentially any issue of law), were to be given greater appellate attention. But there is little reason to believe that this finer review struck fear in the hearts of district judges—de novo review is commonplace and unremarkable for lower courts. Indeed, while it is undeniable that most judges prefer not to be reversed, intense judicial peer review is an integral and vital component of the process. Similarly, the requirement of a prosecutorial motion to consummate a substantial assistance downward departure may curtail a judge's authority, but it does no more than that. The motion requirement does not forebode any unspoken consequence to the sentencing judge, such as the loss of employment in response to a displeasing decision.

By contrast, the "minatory" provisions do portend such consequences. Feeney II requires the chief judge of each district to submit to the Sentencing Commission: a written report of the sentence; the offense for which it is imposed; the age, race, and sex of the offender; and information regarding several factors made relevant by the Guidelines.[66] Furthermore, Feeney II states that "[t]he [Sentencing] Commission shall, upon request, make available to the House and Senate Committees on the Judiciary, the written reports and all underlying records accompanying those reports described in this section . . . ."[67] Lastly, Feeney II requires the Attorney General to report all downward departures (other than

63. PROTECT Act, Pub. L. No. 108-21, § 401(a), (b), 117 Stat. 650, 667–69 (2003).
64. *Id.* at § 401(d), 117 Stat. at 670–71.
65. *Id.* at § 401(g), 117 Stat. at 672.
66. *Id.* at § 401(h), 117 Stat. at 672.
67. *Id.*

those for substantial assistance to the government) to the House and Senate Judiciary Committees within fifteen days of sentencing.[68] Professor Zlotnick notes that "one cannot really argue that Congress should be forbidden from collecting this information,"[69] but this overlooks (as well as proves) the point. It is precisely because sentencing data are matters of public record that Feeney II's onerous reporting requirements[70] could not represent anything other than a threat to sentencing judges—essentially, expressing the sentiment, "we're watching you," and nothing else.[71] What is the point of this type of surveillance? "A tool for intimidation" is one oft-voiced answer,[72] and it may be that Congress intended the reporting requirement as a bullying device for its own sake; by compiling sentencing statistics that include the names and departure rates of individual judges, Congress may be intimidating judges into departing downward less frequently merely to keep Congress happy. Given the structural relationship between Congress and the courts, however, the grounds for intimidation may be more complex. Congress has the power to impeach the judge if he is not performing satisfactorily, cumbersome as that process may be. In fact, Congress's *only* constitutional tool of control over the employment of individual, life-tenured federal judges is the broadsword of impeachment.[73] Therefore, it stands to reason that one of the most plausible purposes for the reporting requirement is to threaten a

68. PROTECT Act § 401(1)(2)(A), 117 Stat. 650, 675.

69. Zlotnick, *supra* note 60, at 233.

70. The reporting requirement is so paperwork intensive that in order to comply with it, Judge Donald Molloy of the District of Montana issued a "standing order" directing the U.S. Attorney to assemble and file with the court clerk a report of the sentence within twenty days of any particular sentencing. United States v. Ray, 375 F.3d 980, 982 (9th Cir. 2004). A majority of the Ninth Circuit panel hearing the government's appeal held the standing order constitutional and not a violation of separation of powers. *Id.* at 988.

71. In response to the "judicial blacklist" argument, Judge Paul Cassell of the District of Utah has called the criticism of the Feeney Amendment's reporting requirement "hyperbolic": "[T]he overriding fact remains that judicial departure decisions (like any other judicial action) are *already* matters of public record. This court's sentencing decisions, for example, are all easily available both in the court's public files and on an internet website, www.utd.uscourts.gov." United States v. VanLeer, 270 F. Supp 2d 1318, 1323–24 (D. Utah 2003); *see also* United States v. Schnepper, 302 F. Supp. 2d 1170, 1196 (D. Haw. 2004) (parroting *VanLeer*). The fact that sentencing decisions are public records and widely available is not logically connected to the conclusion that Congress's intent in imposing the reporting requirement was benign; in fact, just the opposite conclusion is far more compelling.

72. Zlotnick, *supra* note 60, at 233.

73. Though it is not a settled question, it is commonly accepted that an individual judge cannot be removed from office except by impeachment. *See* Sen. Jeff Sessions & Andrew Sigler, *Judicial Independence: Did the Clinton Impeachment Trial Erode the Principle?*, 29 CUMB. L. REV. 489, 506 (1998). I focus on individual judges because Congress has other tools over the judiciary as a whole, such as the power to strip jurisdiction. But Congress cannot, for example, compel a judge to impose a specific sentence on a particular criminal defendant, notwithstanding its injunctions that judges adhere to the Guidelines. *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 146–47 (1872) (holding that Congress cannot constitutionally direct particular results in given cases).

judge with removal from the bench unless he imposes sentences that pass congressional muster.[74]

Feeney II also bars district courts whose downward departures have been reversed (under the then-new de novo standard) on appeal from providing another reason to depart on remand.[75] This rule is a clear indication that Congress is not really serious about an accurate application of its own Guidelines.[76] Judges are given a single chance to depart downward. The logic seems to be that it is categorically suspicious that a judge would elect to use that chance at all, but it is intolerable to permit that judge a second opportunity, even if circumstances are such that a correct application of the Guidelines would permit it. Again, the "no seconds" rule requires an assessment of congressional motivation. Since it does not correlate to a more accurate system of sentencing,[77] the reasons for it must be discerned elsewhere. One explanation for the rule is that it forms a natural extension of the reporting requirement. Under this theory, the rule can be explained by positing that its supporters believe that judges who depart downward and who are then reversed are more likely to do so in the same case on remand than judges who did not depart in the first instance. There is no reason to continue collecting sentencing data when a judge has already indicated his inclination to depart once in a case; all that remains is to stop him from departing.

There are ways to render the "no seconds" rule all but meaningless in practice, but they are not necessarily conducive to a better sentencing system. For example, a district court that is inclined to depart downward now has incentive to do so on a large number of grounds, some of which may apply and some of which may not, simply to cover all possible avenues that may be foreclosed

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74. *Cf.* Mauro, *supra* note 6 (reporting the comments of Representative Feeney: "Scrutinizing judges is a valid role for members of Congress, [Feeney] said, especially since the Constitution provides only for impeachment as a method of punishment. 'When your only option is the nuclear option, you're very limited.'").

75. PROTECT Act, Pub. L. No. 108-21, § 401(e), 117 Stat. 650, 671 (2003).

76. This point is made by Professor Miller, who has commented on Congress's deep dissatisfaction with and "true anger" at the Guidelines, in addition to its belief that the Guidelines are overly moderate. *See* Miller, *supra* note 54, at 1248.

77. That the "no seconds" rule is irrational from the perspective of sentencing accuracy is easily demonstrable. A judge who is reversed after departing downward for reason A may realize on remand that reasons B, C, or D are also legitimate grounds upon which to depart. Alternatively, reasons B, C, and D may have become legitimate reasons upon which to depart at some point after the first sentencing and before the resentencing. If reasons B, C, or D are improper grounds for departure at the resentencing, the appellate court will reverse using their heightened de novo standard of review. But a judge who is incapable of testing the propriety of reasons B, C, or D runs the (avoidable and unnecessary) risk of erroneously applying the Guidelines. It is not yet clear how the *Booker* decision, discussed *infra*, will impact the "no seconds" rule.

after remand.[78] Perversely, if adopted, this practice will artificially pad a judge's departure statistics because it will increase the quantity of data contained in the individual reports to Congress but may not reflect the judge's true inclinations toward departures.[79]

Unsurprisingly, the reaction of federal judges to the Feeney Amendment has been overwhelmingly negative.[80] Chief Justice Rehnquist himself called it "an unwarranted and ill-considered effort to intimidate individual judges in the performance of their judicial duties,"[81] and even adverted indirectly, in the context of the reporting requirement, to Congress's looming impeachment power.[82] Chief Judge William Young (D. Mass.) suggested (only partly sarcastically) that the "no seconds" rule was in all likelihood overtly intended to

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78. *See* Tracy Friddle & Jon M. Sands, *"Don't Think Twice, It's All Right": Remands, Federal Sentencing Guidelines & The Protect Act—A Radical "Departure"?*, 36 ARIZ. ST. L.J. 527, 541 (2004).

79. *See id.* ("The Protect Act is not clear if the district court need actually sentence on the departure basis at the time. This could be a situation where a district court identifies several bases for a departure, but decides to actually depart on only one, it can still use the other departures as valid grounds. Nonetheless, the better practice would seem to be for a ruling in the alternative to allow an appellate court to assess and rule on these matters.").

80. *See, e.g.*, United States v. Khan, 325 F. Supp. 2d 218, 233 (E.D.N.Y. 2004) ("The Feeney Amendment, among other unsound innovations, prohibits a downward departure unless the ground for departure was relied upon in the previous sentencing and approved by the court of appeals."); *In re* Sentencing, 219 F.R.D. 262, 264 (E.D.N.Y. 2004) (requiring that all sentencings be videotaped for appellate review, in response to the Feeney Amendment, as Judge Jack B. Weinstein felt that the reviewing court should see and hear the defendant); United States v. Mendoza, No. 03-CR-730-ALL, 2004 WL 1191118, at *6 (C.D. Cal. Jan. 12, 2004) (holding the reporting requirement unconstitutional because it allows "individual judges to be singled-out, threatened, intimidated, and targeted"); United States v. Dyck, 287 F. Supp. 2d 1016, 1022 (D.N.D. 2003) (urging federal judges to speak out against the Feeney Amendment); Brief for Appellant at 5–6, United States v. Thompson, 367 F.3d 1045 (8th Cir. 2004) (No. 03-3632) (basing appellant's appeal on the statement of U.S. District Judge David S. Doty of the District of Minnesota, who refused to depart downward in a case because "'judges read newspapers and watch news broadcasts on television . . . and I think the Court's under some pressure now because frankly I follow the trials and tribulations of my chief judge. Consequently, I am frankly . . . not going to [depart downward]'") (emphasis omitted); Miller, *supra* note 54, at 1248 n.139 (referring to angry reactions to the Feeney Amendment in decisions by Judge Robert P. Patterson in *United States v. Kim*, No. 03 Cr. 413 (RPP), 2003 WL 22391190, at *7 (S.D.N.Y. Oct. 20, 2003), and Judge Paul A. Magnuson in *United States v. Kirsch*, 287 F. Supp. 2d 1005, 1006–07 (D. Minn. 2003) ("This reporting requirement system accomplishes its goal: the Court is intimidated, and the Court is scared to depart.")). Professor Zlotnick has recently published an article based in part on his interviews with a number of district judges, many of whom expressed their dissatisfaction with the Feeney Amendment and the federal sentencing system. *See* David M. Zlotnick, *Shouting Into the Wind: District Court Judges and Federal Sentencing Policy*, 9 ROGER WILLIAMS U. L. REV. 645 (2004).

81. CHIEF JUSTICE WILLIAM H. REHNQUIST, 2003 YEAR-END REPORT ON THE FEDERAL JUDICIARY (Jan. 1, 2004), *available at* http://www.supremecourtus.gov/publicinfo/year-end/2003year-endreport.html; *see also* Gina Holland, *Justice Raps Sentencing Rules*, ASSOCIATED PRESS, Mar. 18, 2004, *available at* http://www.boston.com/news/nation/washington/articles/2004/03/18/justice_raps_sentencing_rules/ (quoting Justice Kennedy's reaction to the Feeney amendment: "The mandatory minimums enacted by Congress are in my view unfair, unjust, unwise.").

82. *See* REHNQUIST, *supra* note 81 ("For side-by-side with the broad authority of Congress to legislate and gather information in this area is the principle that federal judges are not to be removed from office for their judicial acts.").

correct the waywardness of his own past sentencing practices.[83] He also took great pains to make perfectly clear that the Feeney Amendment does not intimidate him[84] (in contrast to Judge Magnuson (D. Minn.), who admits his intimidation)[85] and that he continues to have confidence in "[t]he constitutional protections designed to insure an independent judiciary."[86] Recently, Judge Owen M. Panner (D. Or.) invalidated the entire Guidelines system solely for the reason that the Feeney Amendment violates the separation of powers.[87] Interesting, too, are the cases of two judges who resigned in protest against the Feeney Amendment and the policies it represents. Judge John S. Martin (S.D.N.Y.), who had vociferously expressed his opposition to the federal sentencing system before the Feeney Amendment, stepped down in direct response to the Feeney Amendment.[88] Judge Robert J. Cindrich (W.D. Pa.) resigned in an at least indirect response to the new sentencing policies, calling them "morally wrong."[89] While it is surely an exaggeration to claim that the Feeney Amendment was the sole cause of these judges' resignations, it is certainly likely (given their uniformly critical comments about federal sentencing) that the

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83. United States v. Green, 346 F. Supp. 2d 259, 283, 285 n.120 (D. Mass. 2004) (calling the Feeney Amendment "the saddest and most counterproductive episode in the evolution of federal sentencing doctrine" and observing that the "no seconds rule" was driven by Congress's "apparent[] disgust[] at the conduct of this Court" as set forth in *United States v. Bogdan*, 302 F.3d 12, 14–15, 17 (1st Cir. 2002), where Judge Young's decision to depart downward for a second time on remand was reversed by the First Circuit).

84. For another example of judicial bravado on the issue of the reporting requirement, see Tom Perrotta, *Panel Laments Lack of Judicial Discretion,* N.Y. L.J., Oct. 28, 2003, at 1 (reporting the comments of Judges Guido Calabresi, Roger J. Miner, and Chester J. Straub of the Second Circuit in a panel hearing on October 9, 2003). When the issue of the defendant's request for a downward departure arose, Judge Miner is reported to have stated to the prosecutor, "If we go along with your adversary, you'll probably take our names and report them to the attorney general." *Id.* As the prosecutor responded, Judge Straub interjected: "Be sure you spell them correctly." *Id.*

85. *See* Kirsch, 287 F. Supp. 2d at 1006–07. Judge Young reports that Representative Feeney "fired back" a response to Judge Magnuson, recommending that he "get out the Constitution, where it's very clear that other than the United States Supreme Court, all of the other federal courts are only established by the will of the United States Congress." *Green*, 346 F. Supp. 2d at 289 n.157 (citing Elizabeth Stawickie, *Judge Speaks Out Against Congress, Ashcroft*, Minnesota Public Radio *at* http://news.minnesota.publicradio.org/features/2003/10/22_stawickie_sentencing/ (Oct. 22, 2003)).

86. *Green,* 346 F. Supp. 2d at 289.

87. United States v. Detwiler, 338 F. Supp. 2d 1166, 1173 (D. Or. 2004). The basis for Judge Panner's separation of powers analysis was the requirement imposed by the Feeney Amendment that the Sentencing Commission need not be composed of any federal judges, and at maximum three judges. Nevertheless, Judge Panner commented that the reporting requirement is in his view "one of the most reprehensible features of the Feeney Amendment." *Id.* at 1178.

88. John S. Martin, Jr., *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31 ("For a judge to be deprived of the ability to consider all of the factors that go into formulating a just sentence is completely at odds with the sentencing philosophy that has been a hallmark of the American system of justice.").

89. Associated Press, *Federal Judge Rips Sentencing Guidelines as He Steps Down* (Feb. 2, 2004), *available at* http://www.phillyburbs.com/pb-dyn/articlePrint.cfm?id=238551.

prospect of enforcing a sentencing system with which they disagreed, and the ominous specter of losing their jobs if they did not, motivated these judges' resignations soon after the passage of the Feeney Amendment.[90] In this sense, the distinction between resignation and removal may not be especially meaningful. Professor Van Tassel notes that "investigations, threats of investigations, and threats of impeachment can be very powerful tools in inducing judges to resign from office voluntarily."[91] If the reporting requirement or the other rules imposed by the Feeney Amendment create an atmosphere wherein some federal judges feel compelled to resign voluntarily, that atmosphere is no less threatening because other judges choose to criticize the Feeney Amendment or simply to endure it without comment.[92]

Radical change to sentencing appears to have come most recently in the form of the Supreme Court's decision in *United States v. Booker*.[93] Drawing on its prior decisions in *Blakely v. Washington*,[94] *Ring v. Arizona*,[95] and *Apprendi v. New Jersey*,[96] the Court held first that the Guidelines violate defendants' Sixth Amendment right to a jury trial because the Guidelines require judges to engage in fact-finding, applying a preponderance of the evidence standard, which impermissibly enhances sentences.[97] In the second, "remedial" portion of the opinion, the Court severed two provisions of the SRA: 18 U.S.C. § 3553(b)(1), which makes the Guidelines binding on the courts, and 18 U.S.C. § 3742(e), which, as already observed, prescribes the appellate standard of review for sentencing decisions.[98] As a result, the Guidelines are now merely advisory (i.e., true guidelines), and, according to the Court, the Feeney Amendment's de novo standard of appellate review for departures is incompatible with the Court's excision of section

90. In the same vein, some judges responded to the Feeney Amendment and its "draconian" policies by taking senior status and declining to hear criminal cases. Zlotnick, *supra* note 80, at 649 & n.15 (citing Richard T. Boylan, *Do the Sentencing Guidelines Influence the Retirement Decisions of Federal Judges?*, 33 J. OF LEGAL STUD. 231 (2004) (providing statistical support that judges took senior status at a higher rate after the Guidelines became effective)).

91. Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—And Disservice—1789–1992*, 142 U. PA. L. REV. 333, 333 (1993).

92. Though the JUDGES Act, H.R. 2213, 108th Cong. (2003), which is presently circulating in Congress, would repeal certain provisions of the Feeney Amendment, it is important to note that the reporting requirement would remain effective under JUDGES. *See* Patrice Stappert, Comment, *A Death Sentence for Justice: The Feeney Amendment Frustrates Federal Sentencing*, 49 VILL. L. REV. 693, 721 (2004).

93. 125 S. Ct. 738 (2005).

94. 124 S. Ct. 2531 (2004).

95. 536 U.S. 584 (2002).

96. 530 U.S. 466 (2000).

97. *Booker*, 125 S. Ct. at 756.

98. *Id.* at 756–57.

3553(b)(1).[99] The "new" standard of appellate review is "unreasonableness."[100]

Does *Booker* sound the trumpet of sentencing revolution? It is too early to tell, but certain portions of the Court's opinion indicate that the Guidelines and most sections of the Feeney Amendment are still very much alive. First, though the Guidelines are no longer technically binding, sentencing judges "must consult [them] and take them into account when sentencing."[101] Judge Paul Cassell has interpreted this requirement to mean that district courts should give "considerable weight" to the Guidelines in determining sentences and should not deviate from them "in all but unusual cases."[102] Second, the Supreme Court was keen to note that nothing, other than the two excisions, has changed: "As we have said, the Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly."[103] From this statement, it appears that the reporting requirement remains wholly unaffected by *Booker*, and there is good reason to expect that it will become a more prominent feature of congressional control over the judiciary.[104] Given the sentencing discretion newly conferred on judges by *Booker*, Congress will be all the more intent on keeping a close watch on judges' sentencing practices; Congress will be equally eager to make this perfectly clear to the judiciary by conducting more frequent investigations of individual judges and/or indirectly (or directly) threatening judges with removal.[105] Some

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99. *Id.* at 764.

100. *Id.* at 765. Of course, this is nothing new at all; it is simply the old standard of appellate review interpreted by the Supreme Court in *Koon* as review for abuse of discretion. Koon v. United Sates, 518 U.S. 81, 98–100 (1996).

101. 125 S. Ct. at 767.

102. United States v. Wilson, 350 F. Supp. 2d 910, 912–13, 932 (D. Utah 2005).

103. *Booker*, 125 S. Ct. at 767.

104. An argument may be made that the reporting requirement is now "dead law." As a technical matter, after *Booker* there are no more "downward departures," so one might claim that there is nothing left to "report" (i.e., since judges no longer need to follow the Guidelines at all, they also need not worry about whether the sentences they impose fall within the Guidelines' ranges). This argument is misguided for at least two reasons. First, *Booker* does not speak, even indirectly, about the Feeney Amendment or the reporting requirement. The Court took pains to emphasize that its decision did not impact any of the existing sentencing superstructure other than the requirement that the Guidelines are binding. *See id.* Second, and more importantly, *Booker* requires judges to consult the Guidelines prior to imposing sentence. *See id.* and text accompanying note 103. Data about judges who disregard the Guidelines by imposing sentences below the prescribed range will still be reported to Congress. With so much sentencing discretion returned to the judiciary post-*Booker*, Congress will take an especially keen interest in reviewing this information. I thank Professor Zlotnick for bringing this issue to my attention.

105. If, as a result of its displeasure with *Booker*, Congress uses the reporting requirement more aggressively by engaging in these types of practices, the question of the reporting requirement's legitimacy may take on constitutional dimensions. *See* Todd David Peterson, *Congressional Investigations of Federal Judges*, 90 IOWA L. REV. 1, 54–55 (2004) ("When the issue shifts from the legitimacy of congressional collection of information from all

judges, like Judge Cassell, may opt for a conservative reading of *Booker*;[106] others may now lawfully elect not to adhere to the Guidelines so assiduously.[107] Until Congress enacts a new sentencing scheme, the potential for conflict between Congress and those judges in the latter group has markedly increased after *Booker*.[108]

One might imagine that the sentencing context, because it is so inherently inflammatory and controversial (as well as so readily politicizable), would be especially conducive to increasing antagonism between the judiciary and the legislature, and consequently, to more frequent threats of judicial removal. The sentencing sphere, however, is not unique. I contend in the following section that Congress has already found other pockets of judicial power and discretion that it covets and we should expect more frequent threats of removal deriving from Congress's usurpative urges.

## B. HOUSE OF REPRESENTATIVES RESOLUTION 568

One year after his success in reshaping the Sentencing Guidelines, Representative Feeney, along with Representative Bob Goodatte (VA), introduced a bill on March 17, 2004, expressing

> the sense of the House of Representatives that judicial determinations regarding the meaning of the laws of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign

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federal judges concerning a matter under legislative consideration to the investigation of a particular judge because of Congress's disagreement with the judge's disposition of sentencing issues or other matters before the judge for decision, the balance between Congress's constitutional interests and the impact on the constitutional prerogatives of the judiciary changes markedly. . . . Investigations of individual judges impose significant professional, reputational, and financial harms on the judges who are subject to the investigative demands. These burdens, *and even the threat of these burdens*, could seriously threaten the independence of the federal judiciary by intimidating federal judges from deciding cases in a manner that might anger powerful members of Congress.") (emphasis added).

106. *See Wilson*, 350 F. Supp. 2d at 931.

107. *See, e.g.*, United States v. Ranum, 353 F. Supp. 2d 984, 987 (2005) ("The guidelines are not binding, and courts need not justify a sentence outside of them by citing factors that take the case outside the 'heartland.' Rather, courts are free to disagree, in individual cases and in the exercise of discretion, with the actual range proposed by the guidelines . . . ."); United States v. Myers, 353 F. Supp. 2d 1026, 1027–28 (2005) (adopting Judge Adelman's position in *Ranum*).

108. In a recent public memorandum, the Sentencing Commission has determined that, as of *Booker*, 61.4% of sentencings are within the Guidelines' range, 1.8% are above the Guidelines' range, and 36.8% are below the Guidelines' range. Of the 36.8% below the range, 22.4% were with a government-sponsored downward departure motion, while 14.4% cited simply "downward departure" or "U.S. v. Booker" for the below-sentence range. Memorandum from Linda Drazga Maxfield, to Judge Hinojosa, Chair of the United States Sentencing Commission, (Apr. 13, 2005), *available at* http://www.ussc.gov/Blakely/Booker_041305.pdf.

> institutions unless such foreign judgments, laws, or pronouncements are incorporated into the legislative history of laws passed by the elected legislative branches of the United States or otherwise inform an understanding of the original meaning of the laws of the United States.[109]

The exception for foreign legal pronouncements that inform the "original meaning of the laws of the United States" likely found its way into Resolution 568—also called the "Reaffirmation of American Independence Resolution"[110]—because it was perceived that barring citations to Blackstone,[111] Edmund Burke, or the King's Bench was not exactly what the House had in mind.[112] Rather, the House was obviously disturbed by what it viewed as a rash of Supreme Court decisions in which the Justices relied on the statements and opinions of (modern-day) European judicial and legal authorities.[113] The Hearing Statement on Resolution 568 of Representative Steve Chabot lists disapprovingly *Lawrence v. Texas*, wherein Justice Kennedy in his majority decision relied on a decision of the European Court of Human Rights;[114] *Atkins v. Virginia*, in which Justice Stevens in his majority opinion cited to an amicus brief filed by the European Union;[115] and *Grutter v. Bollinger*, in which

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109. H.R. Res. 568, 108th Cong. (2004).

110. Jeffrey McDermott, *Citation to Foreign Precedent: Congress vs. the Courts*, 51-JUL FED. LAW. 20 (2004).

111. *See* Foster v. Florida, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring in denial of certiorari) (citing Blackstone approvingly but criticizing the foreign views of the Supreme Court of Canada as presumptively suspect: "[T]his Court's Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans.").

112. Moreover, the wholesale disapproval of all foreign pronouncements would have been highly impractical, as it would have impugned the scores of Supreme Court decisions relying on such precedents.

113. *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H. Res. 568 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 108th Cong. 1–3 (2004) [hereinafter *Hearing on H. Res. 568*] (statement of Rep. Steve Chabot, Chairman, House Subcomm. on the Constitution), *available at* http://www.judiciary.house.gov/Hearings.aspx?ID=27.

114. *Id.* at 3; *see* Lawrence v. Texas, 539 U.S. 558, 573 (2003) (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (1981)). The European Court of Human Rights is "[a]uthoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now)." *Id.* Bowers v. Hardwick, 478 U.S. 186 (1986), did not follow *Dudgeon* on the issue of the right of homosexuals to engage in intimate, consensual conduct. As noted by Representative Chabot, in his dissent Justice Scalia criticized the majority's citation to "foreign views" as "meaningless" and "[d]angerous dicta." *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting).

115. 536 U.S. 304, 316 n.21 (2002) ("Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. Brief for The European Union as Amicus Curiae in McCarver v. North Carolina, O.T. 2001, No. 00-8727, p. 4."). Justice Stevens also cites to numerous research studies throughout the opinion in support of his conclusions, but he does not specify whether these contain foreign data. Nor is there any indication from the House whether it would find non-U.S. academic studies suspect.

Justice Ginsburg cited in her concurrence to an international treaty—the International Convention on the Elimination of All Forms of Racial Discrimination.[116] Congressman Chabot states his belief (and, presumably, that of the sponsors and proponents of Resolution 568) that "Americans are subject to the decisions of the United States Supreme Court that are based, at least in part, on selectively cited decisions drawn by a variety of foreign bodies."[117]

Resolution 568 is an attempt to limit and disavow the presence of exogenous legal influences in judicial decisions, and as such it is a rather petty and xenophobic concept; statements of law and policy that come from other nations, of course, never bind U.S. courts; when they are included in American decisions (which is not often), they are used merely for their persuasive value—to note that an argument originates with a particular foreign source, to support an argument with a certain line of foreign reasoning, or to show how an American view compares with other world views. In any case, there is no logic to the contention that an argument loses its persuasive force because it originated outside of our national geographic bounds.

But beyond the knee-jerk provincialism that Resolution 568 represents, it is also a manifestation of Congress's will to control another area traditionally reserved for the judge—the sources cited in and supporting judicial decisions. The putative bill would expressly permit reliance on foreign sources if they had been "incorporated into the legislative history of laws passed by the elected legislative branches."[118] This exception gives rise to several inferences. First, it indicates that the bill's supporters are not so much disturbed by the inclusion of foreign precedent per se as they are about citation to foreign precedent with which they either are unfamiliar or disagree. Second, the solution proposed by Resolution 568 is not the wholesale rejection of foreign precedent; rather, it is a reservation to Congress of the power to handpick which foreign precedent is appropriate for consideration and inclusion in judicial decisions. The reappearance of Representative Feeney as an advocate both of further restrictions on the powers of the judiciary (this time far outside the sentencing realm) and, as discussed below, of the use of threats of impeachment in response to anticipated judicial noncompliance suggests that the

116. 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring). It is worth noting that the United States ratified the International Convention on the Elimination of All Forms of Racial Discrimination in 1994. *See* 140 CONG. REC. 7634 (1994).

117. *See Hearing on H. Res. 568*, *supra* note 113, at 3. The trend toward examining and incorporating foreign legal views into Supreme Court decisions is not abating. Justice Kennedy has written a recent majority opinion that relies heavily on foreign legal opinion in concluding that the Eighth Amendment forbids imposing the death penalty on offenders under the age of 18. Roper v. Simmons, 125 S. Ct. 1183, 1198–1200 (2005).

118. H.R. Res. 568, 108th Cong. (2004).

House (or at least some of its members) is motivated by something other than a real interest in the subject matter of its lawmaking. What it wants is greater control over the judiciary, irrespective of the substantive context.

It is true that Resolution 568 is still in its larval stage—there is no indication yet about its prospects for maturation in the House or Senate, let alone of its appeal to the President.[119] Moreover, even if passed, it merely would express Congress's "sense" of disapprobation for the practice of reliance on non-sanctioned foreign sources; there is nothing in the bill as presently constituted that speaks of consequences for disobedience. Nevertheless, incredibly, it has already been suggested by Representative Feeney that judicial disregard for Resolution 568's "sense" could be cause for removal from the bench.[120] This is archetypal of the use of the threat of impeachment as an instrument of political coercion: few may agree (Representative Feeney, I submit, included) that the decision to cite to a foreign decision or legal statement is grounds for impeachment. It is certainly not a high crime or misdemeanor. But is it "bad behavior"? Assuming that Resolution 568 becomes law (and to a lesser degree, even if it does not), citation to foreign precedent would certainly be controversial, since it would openly defy the legislative will. Moreover, while a judge who cited to a foreign precedent in the face of Resolution 568 might not expect impeachment to follow hot on the heels of his decision's publication, he might do so with trepidation because he would know that Congress would "disapprove" of him and would be on the lookout for other, similar peccadilloes. And, perhaps in such a scenario, multiple and repeated citations to foreign precedents would, over time, raise sufficiently important eyebrows to result in formal inquiries.[121] Such recurring acts of defiance might not be "good behavior"; following the model

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119. *See* McDermott, *supra* note 110, at 21.

120. *See* Mauro, *supra* note 6 ("In discussing the resolution, Feeney suggested that invoking foreign precedents—increasingly popular from the Supreme Court on down in recent years—could be an impeachable offense. Sensenbrenner, in his Judicial Conference speech, cited Feeney's resolution favorably."); McDermott, *supra* note 110, at 21 ("Rep. Feeney raised the possibility that Congress could impeach judges who continue to cite foreign precedent.").

121. Or the judge's decision to flout the legislative will might prove costly when opportunities for elevation arise. *See* Hon. Guido Calabresi, *The Current, Subtle—and Not so Subtle—Rejection of an Independent Judiciary*, 4 U. PA. J. CONST. L. 637, 643–44 (2002) ("The real danger . . . is that if judges think about promotion, they are going to start being very careful not to make waves. If you are a district judge and you want to get on the court of appeals, it does not help to have senators of the right or the left criticizing your opinions . . ."); Hon. Alex Kozinski, *The Appearance of Propriety*, LEGAL AFF., Jan.–Feb. 2005, at 20 ("And how does a judge reconcile his career ambitions with principled application of the law and sensitivity to individual justice? Let's say you're a district judge hoping for promotion. In criminal cases, do you consider that the attorney general, who has considerable say in the appointment and elevation of federal judges, has adopted a policy of keeping track of district judges who sentence defendants below the range suggested by the sentencing guidelines? How do you keep it *out* of your mind?").

of Judge Baer, threats of impeachment would be the likely congressional response.[122]

Several members of the House Judiciary Committee have expressed views that reinforce the argument that control over the judiciary, rather than mere disdain for foreign legal pronouncements, is the true force driving Resolution 568. For example, Representative Feeney stated:

> One of the problems we have with importing foreign law that's never been ratified by any of the political branches, the elected branches, is that judges have enormous discretion. . . . [A]nd how is a judge . . . to discern which of the countries[' decisions] is appropriate to cite and which . . . is not . . . .
>
> [The Supreme Court is] not competent to do so . . . .[123]

This refrain was repeated by Representative Steve King (IA) who made it clear that Resolution 568 is only the first step in what he feels should be a grand and far-reaching program of stripping away judicial power:

> The Constitution gives the Congress the authority and the responsibility to establish . . . the separation of powers between the Legislative and Judicial [b]ranch of [g]overnment . . . . [W]e have an activist court that's taken over so much authority from the Legislative Branch.

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122. Congressman Feeney is an especially illuminating case study because he obviously favors threatened removals as an effective mechanism of judicial control. *See Reauthorization of the U.S. Department of Justice: Executive Office for U.S. Attorneys, Civil Division, Environment and Natural Resources Division, Executive Office for U.S. Trustees, and Office of the Solicitor General: Hearing Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary,* 108th Cong. 30 (2003), *available at* http://www.judiciary.house.gov/Oversight.aspx?ID=23. In response to a situation in which Judge Royce C. Lamberth (D.D.C.) was considering contempt sanctions against Deputy Assistant Attorney General Stuart Schiffer, Congressman Feeney, though openly admitting that he knew nothing of the case, commented:

> [U]ltimately, in separation of powers issues, [the Executive branch is] probably not the court of last resort in terms of [A]rticle I powers. . . . [B]ut I also like [A]rticle I, especially now that I am in Congress.
>
> And it seems to me that at a minimum that Congress has the right to set the jurisdiction of Federal judges. Harassing several dozen members of the Justice Department seems to be something that we could effect [sic] with our jurisdictional powers. . . . And then ultimately, of course, there is the question of the judge's good behavior.

*Id.* at 30.

123. *Hearing on H. Res. 568, supra* note 113, at 6.

> . . . .
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> So I think we've got a lot of work to do here, and I don't know that we have to do it in a radical fashion. I think we need to do it in a step-by-step fashion, this being step one, and to send this resolution to limit the courts to the directions that Mr. Feeney has described . . . and I think we need to follow along with that and do a number of other things to brighten this line of the separation of powers.[124]

This separation of powers argument is not quite ingenuous. Congress has never been charged (constitutionally or otherwise) with selecting which legal precedents the courts may use to interpret the law or to support the reasoning of their decisions.[125] But by claiming that it is the judiciary that is usurping a historically legislative power, Representative King was able to invoke the sacred cow of separation of powers to support a general program—one of whose first steps is Resolution 568—allegedly to "brighten this line [of the separation of powers]." Ironically, Resolution 568 itself represents a blurring of the separation of powers because it is a move by Congress to absorb a traditionally judicial function. More important, however, in Representative King's view, is that the Resolution may be the first sown seed in what will flower into a comprehensive system of legislative control over the judiciary.

Representative Chabot's comments specifically concern the enforcement of Resolution 568 (i.e., what happens to judges who disregard Congress's "sense"), but also reflect a wider interest in increasing the penalties and consequences for judges who resist the new tide of changes that resolutions such as 568 represent:

> And one of the issues that is underlying this resolution and I suspect, future clashes . . . between the Congress and [the] Judiciary is the question of whether the Founding Fathers . . . really placed in our Constitution enough checks and balances on this [judicial] power or whether it's simply a failure of the Congress and the Executive Branch to act in response to the acquisition of power that has taken place on the part of our Judiciary . . . .
>
> So I would express my concern . . . on what measures the Congress could take to effectively exercise

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124. *Id.* at 8.

125. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

> that system of checks and balances that is so clearly contemplated in our Constitution against abuse of power. Clearly, we've never removed anybody from office for misinterpreting in our view a section of the Constitution, and clearly we have never taken the steps that have been discussed by others, and perhaps we could, but they are very difficult steps.
>
> Are there other things that we should be looking at to check unbridled power on the part of the Court?[126]

One of the "other things" that is already being done is to threaten judges with removal. The possibility inheres in Representative Chabot's musing that "perhaps we could" use removal as an instrument of punishment, despite the "difficult[y]" of the endeavor to effect an actual impeachment. Indeed, Representative Adam Schiff (CA) compared Resolution 568 to the reporting requirement of the Feeney Amendment, observing that both (in "combination")[127] might have "a chilling impact on the independence of the Judiciary."[128] One may well ask why Congress should bother to pass a law that expresses its position on the question of citation to foreign law if judges are free to reject that position without fear of adverse consequences. In her testimony before Congress on Resolution 568, Professor Vicki Jackson referred directly to the threat of removal as an undeniable presence hovering over the resolution:

> What concerns me, Mr. Chairman, about a collective resolution from the House of Representatives is the fact . . . that . . . the Congress, of course, controls to some extent the jurisdiction of the Federal courts. The Congress is also the body in power to impeach and remove from office the justices, and my concern is that a resolution of this nature begins to trench on the courts with respect to the interpretative process; and if there is anything that I would think was a core judicial function for the courts, it is how to interpret.
>
> And so it is those factors that lead me to be very concerned about the proposed resolution.
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> . . . .

126. *Hearing on H. Res 568, supra* note 113, at 52.

127. *Id.* at 51.

128. *Id.* The comparison was made in the form of a question to Professor Jeremy Rabkin, who did not answer it.

> . . . I want to raise a grave caution about the idea that the impeachment power ever would be used because of disagreement with a decision.[129]

Representative Jerrold Nadler (NY), commenting on Representative Feeney's statements about the "ultimate remedy" for judicial noncompliance with Resolution 568, was more direct: "In other words, we're threatening impeachment if we disagree with the Court. That is the definition of intimidation."[130]

I do not wish to confuse the issue of the propriety of citation to foreign legal sources with my principal point—that Congress's interest in limiting such citations is actually driven by a larger, overarching desire to strip away traditionally judicial functions and to gain greater control over the judiciary, and that it will threaten judges with removal to meet those ends. Certainly, there are cogent arguments to be made for and against the use of foreign legal opinion in American caselaw. For example, Professor Harold Koh has suggested that "transnationalist jurisprudence," whose champions on the current Court, he believes, are Justices Ginsburg and Breyer, is a "venerable" judicial approach practiced since the birth of the republic and which "assumes America's political and economic interdependence with other nations operating within the international legal system."[131] Likewise, Professor Daniel Bodansky observes that the knowledge of and respect for international law is a long-standing American tradition and that the Supreme Court historically has often looked to international law in construing the powers of the federal government.[132] "In contrast to today," he writes, "I am not aware that when the Court, in these earlier cases, paid a decent respect to the opinions of mankind, this was criticized

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129. *Id.* at 35, 53; see also statement of Representative Schiff:

> We are shooting across the bo[w] [of the judiciary] when we threaten to subpoena the records of Judge Rosenbalm [sic] who comes before the panel and expresses what's an unpopular opinion with the panel. We shoot across the bo[w] when we use the word 'impeachment' in reference to the citing of foreign opinion.
>
> . . . .
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> . . . [T]hat we have decided to showcase this issue, attack this, I think is part of a broader and more disturbing trend that is probably more significant than these isolated references to foreign opinion.

*Id.* at 36–37.

130. *Id.* at 43.

131. Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 52–53 (2004). Professor Koh contrasts the "transnational" approach with "national jurisprudence," favored in his view by Justices Scalia and Thomas. *Id.* at 52.

132. *See* Daniel Bodansky, *The Use of International Sources in Constitutional Opinion*, 32 GA. J. INT'L & COMP. L. 421, 423–24 & nn.13–16 (2004).

as illegitimate or otherwise un-American."[133] Others have disagreed, arguing that "[i]ncluding a new source [international law] fundamentally destabilizes the equilibrium of constitutional decision making,"[134] or that the selective use of international materials "serves as mere cover for the expansion of selected rights favored by domestic advocacy groups, for reasons having nothing to do with anything international."[135] Judge Posner has recently presented four grounds for his conclusion that citation to foreign sources as persuasive argument should be avoided.[136] At least some of these reasons are, in my view, problematic,[137] but none of these arguments speak directly to a *congressionally*-imposed, categorical rule disallowing, with sanctioned exceptions, the inclusion of foreign sources in American judicial decisions. The selected statements of the House members provide a better understanding of the motivations undergirding Resolution 568 than do the academic musings about the desirability of using foreign sources. And those legislative expressions demonstrate that Resolution 568 is widely intended merely as one small stage in what many in Congress hope will be a far-ranging program of absorbing judicial power.

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133. *Id.* at 426.

134. Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 57–58 (2004).

135. Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on* Atkins *and* Lawrence, 98 AM. J. INT'L L. 69, 69 (2004).

136. Richard Posner, *Argument: Could I Interest You In Some Foreign Law? No Thanks, We Already Have Our Own Laws*, LEGAL AFF., July–Aug. 2004, at 40–42 (2004).

137. *See, e.g.*, *id.* at 41. Judge Posner's "first problem"—that "according . . . precedential weight to foreign or international decisions" offers "promiscuous opportunities" for citation as precedents—brings to bear the generally accepted rule against citing to unpublished decisions, believing it to be sound "because those opinions receive less careful attention from the judges than the ones they publish." But there is no necessary parallel with foreign decisions here. A rule categorically forbidding citation to foreign decisions does not discriminate between, on the one hand, decisions intended by foreign judges as precedential and, on the other, the foreign equivalent of the unpublished decision. Of course, judges wishing to cite, for example, Italian precedent should be familiar with the difference in precedential value between the decisions of, say, la Corte di cassazione, la Pretura, and la Corte d'assize (as they should be familiar with the respective jurisdictional competence of each of these courts). Once a certain background knowledge is established, however, foreign precedent could add desirable nuance to the analysis of many issues in American law.

Judge Posner's "second problem"—that judges are "almost entirely ignorant" of other countries' "socio-historico-politico-institutional background[s]"—suffers from the same type of flaw as his first problem. There is no reason to suppose that American judges, at all levels, have the sort of broad cultivation with respect to American socio-political history that Posner would require. Nevertheless, when confronted with particular issues to decide, judges often educate themselves about the background of their particular legal question. Why should they not seek as broad-based an education as possible?

*See* Vicki Jackson, *Could I Interest You in Some Foreign Law? Yes Please, I'd Love To Talk With You*, LEGAL AFF., July–Aug. 2004, at 43. ("Understanding references to foreign law in their legal and historic context should defuse unwarranted criticisms, highlight the benefits of well-informed uses of foreign and international legal sources, and focus attention on some genuinely difficult questions.").

This article has examined two legislative programs (the Feeney Amendment and Resolution 568) that strip federal judges of powers they have traditionally held, and has argued that their sponsors and proponents are prepared to threaten judges with removal for noncompliance. But there are several other examples of "jurisdiction stripping" bills that have either already been enacted or will be introduced in the coming terms. With the defeat in the Senate of the constitutional amendment banning gay marriage, Representative John Hostettler (IN) introduced legislation that would bar federal courts from hearing lawsuits, including lawsuits that raise constitutional issues, related to homosexual sex and marriage.[138] This bill passed in the House on July 22, 2004,[139] and House Majority Leader Tom DeLay (TX) "told reporters . . . that he plans to use 'jurisdiction stripping' measures to achieve other social policy goals as well," including proposed legislation to prevent federal courts from hearing lawsuits related to the words "under God" in the Pledge of Allegiance and, though he believes the time is "not quite ripe," eventually to the issue of abortion.[140] Obviously, the constitutionality of such measures is unclear.[141] Nevertheless, these bills and others of similar stripe very much represent the type of

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138. Jonathan E. Kaplan, *New GOP Gay-Ban Tactics; Court Powers Could Be Taken Away, Says Majority Leader*, THE HILL, July 15, 2004. This legislation reflects another fledgling congressional tactic of judicial control, one that Representative Hostettler seemed to advocate in the hearing on Resolution 568, as he posed the following question to Professor Jackson: "You're not familiar with the elimination of jurisdiction from the Supreme Court, the power, for example, of the purse not to fund the enforcement of decisions by the Court and others?" *See Hearing on H. Res. 568, supra* note 113, at 46.

139. H.R. 3313, 108th Cong. (2004); *see* Mary Fitzgerald & Alan Cooperman, *Marriage Protection Act Passes; House Bill Strips Federal Courts of Power over Same-Sex Cases*, WASH. POST, July 23, 2004, at A4.

140. Kaplan, *supra* note 138.

141. *See* Editorial, *Muzzling the Courts?*, WASH. POST, July 21, 2004, at A18:

> [F]oes of same-sex marriage are back with another radical proposal. This time they are pushing a bill that would prevent federal courts from hearing challenges to a federal law that limits gay marriage. . . . Making this attack all the more ominous is House Majority Leader Tom DeLay's stated intention to promote similar bills to bar court challenges to the Pledge of Allegiance and, potentially, on other social issues.
>
> . . . .
>
> Just how far Congress can go in preventing judicial consideration of its actions is a thorny constitutional question.

*Id.*

Congress may very well be vested with the power to strip the Supreme Court of jurisdiction over many of these issues, since the Supreme Court's original jurisdiction only extends to "Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party." U.S. CONST. art. III, § 2, cl. 2. Moreover, as many in the House Judiciary Committee are fond of repeating, the Constitution vests Congress with the power to "ordain and establish" the inferior federal courts. U.S. CONST. art. III, § 1. Whether, once established, Congress could limit these courts' jurisdiction (or abolish them altogether) is another question.

pervasive program envisioned by Representatives Feeney, King, Goodlatte, Chabot, DeLay and many others.[142] In the face of this "jurisdiction stripping" legislation, judges will have three options: acceptance, criticism, or resignation. If the Feeney Amendment and Resolution 568 are any guide, judges who choose the second approach should expect Congress to threaten them with removal for their opposition.[143]

## III. TWO (INTERRELATED) EXPLANATIONS FOR THE PHENOMENON

What can explain the present pervasiveness of congressional threats of removal against judges? The question is complex, and its

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142. *See Hearing on H. Res. 568, supra* note 113, at 34–35 (reporting Statement of Representative Chabot: "We've not taken the step of using our authority to alter the lower Federal courts under [A]rticle I, [S]ection 8, for example, or to alter the appellate jurisdiction of the Supreme Court on our [A]rticle III, [S]ection 2 [authority]. That step might be appropriate in the future . . . .").

In fact, Congress has already taken that step in other contexts. *See* Geyh, *supra* note 24, at 155 ("Members of Congress have introduced legislation to strip the lower federal courts of jurisdiction to hear cases on politically sensitive subjects, and Congress has gone so far as to enact procedures limiting the opportunities for federal court review in such areas as habeas corpus proceedings, immigration, and prisoner rights litigation."); *see also* Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445, 2445 (1998) ("In 1996, Congress enacted several laws restricting the jurisdiction and remedial powers of the federal courts across a range of litigation brought by prisoners and immigrants.").

143. Of course, I do not claim that this movement in the House of Representatives sprang into being just in the last year. But I do believe it to be the development of something that is less than a decade old. *See* Geyh, *supra* note 24, at 154 ("Senate Majority Leader and Presidential candidate Bob Dole, Speaker of the House Newt Gingrich, and House Majority Whip Tom DeLay advocated impeachment and removal as a remedy for judges they characterized as activist."); *see also Judicial Misconduct and Discipline: Hearing Before the Subcomm. on Courts and Intellectual Prop. of the House Comm. on the Judiciary*, 105th Cong. (1997) (statement of Representative Bob Barr (GA)):

> [I]t is time to begin exploring how and in what way we might take steps to 're-balance' and restore integrity to our Federal judicial system. This includes, but is not limited to, exploring the manner in which the constitutional tenure for judges to hold their office during 'good behavior' can be fully effectuated to take into account the consequences for misbehavior—a problem plainly presented [to] the American people by the assumption of power beyond the scope of the office.
>
> There are . . . a number of ways that the problems of judicial activism or overreaching[] can be addressed: defining 'good behavior'; limiting tenure of judges; limitations on the jurisdiction of judges, and impeachment.").

*Id.* at 15.

Jurisdiction stripping bills were certainly not unheard of in earlier decades but very few of them were enacted. *See* Thomas I. Vanaskie, *The Independence and Responsibility of the Federal Judiciary*, 46 VILL. L. REV. 745, 770 (2001) ("It has been reported that, between 1953 and 1968, more than sixty pieces of legislation were introduced in Congress to restrict federal court jurisdiction over particular matters." But "these efforts were unsuccessful . . . ." Jurisdiction stripping, therefore, as an effective congressional mechanism of judicial control, is of relatively recent vintage.).

answers are likely numerous—too many, in fact, for the space and scope of this article. Part of the explanation lies in the indeterminacy of possible conduct encompassed by the "good behavior" clause, which has been directly invoked by Congressman Feeney as the standard by which judicial removals should be assessed.[144] Political ideology jumps out immediately as a plausible motive, and, in the case of the legislation I have examined, it is conservative political ideology (harsher penalties for criminals and a reflexive distrust of foreign legal thought) that seems to predominate. In fact, some have argued that conservatives have seethed at least since the Warren Court era—i.e., "from the *Miranda* decision to the recent case overturning the Texas sodomy statute" [145]—about the purported liberalism of the judiciary. It is no accident, after all, that the vast majority of Congressmen sponsoring and supporting the Feeney Amendment, Resolution 568, and the various jurisdiction stripping measures are staunch conservatives, as are those who seem most inclined to threaten removal for disregard of their ideological viewpoints. There is surely some truth to the contention that conservative ideology is one of the forces driving the current congressional hostility toward the judiciary.

Conservative ideology alone, however, is an insufficient explanation. Congressional Democrats have been extraordinarily active in preventing President Bush's judicial nominees from ascending the bench, and that, too, is a kind of antagonism toward the judiciary.[146] The vitriolic tenor of these appointment battles is no less high-pitched than in the contexts I have discussed, and liberal ideology is the constitutional impediment, as it has been at many other times in the past.[147] To this argument it may properly be

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144. *See* Curry, *supra* note 8.

145. *See* Zlotnick, *supra* note 60, at 250–51.

146. At no time in American history has the Senate been more active in blocking presidential appointees to the federal appellate bench. *See* Editorial, *The Filibuster Express*, WALL ST. J., July 21, 2004, at A10:

> Democrats began their seventh filibuster of a Bush judicial nominee yesterday. No Senate has ever filibustered a President's appellate-court nominee before, but never mind. Watch for the number of filibusters to hit double digits by September.
>
> . . . John Kerry and John Edwards missed the . . . vote, but their support of the filibuster tactic is well-established—a fact that will boomerang against their nominees if they win this fall.

*Id.*; *see also* Michael J. Gerhardt, *Federal Judicial Selection as War, Part Three: The Role of Ideology*, 15 REGENT U. L. REV. 15 (2003).

147. Professor Barry Friedman has argued that historically, both liberals and conservatives have attacked the judiciary on substantive grounds. *See* Barry Friedman, *'Things Forgotten' in the Debate Over Judicial Independence*, 14 GA. ST. U. L. REV. 737, 738 (1998) ("[C]ontrary to the impression many seem to hold today, throughout history attacks on the judiciary have come from both sides of the political spectrum. Today it seems to be conservatives who are attacking judges, but for many years liberals sat in the critic's chair.").

responded that it is not conservative or liberal ideology, but ideology generally, that is to blame for the poor state of relations between the judicial and legislative branches. This position requires us to ask what is intended by "ideology." If we accept that one definition of ideology is "the ways in which meaning establishes and sustains relations of power,"[148] then it becomes critical to examine the way in which the legislature and judiciary share and compete for power. With this definition in mind, I offer what is surely an incomplete list of two other explanations for the prevalence of congressional threats of removal against the judiciary—one theoretical and the other social— that, when taken in tandem, may make some sense of the current state of affairs.

## A. THE THREAT AS RATIONAL IN THE CONTEST FOR POWER AMONG THE LEGISLATIVE AND JUDICIAL BRANCHES

One might reasonably suppose that no judge has ever been impeached, tried, and removed who was not first threatened with removal. If that claim is accepted, one might ask why anyone should

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Friedman further notes: "[A]t least from the time of the *Dred Scott* decision until the defeat of Roosevelt's Court-packing plan, the critics' chair has been filled largely with speakers from the left." *Id.* at 754.

The labels "conservative" and "liberal" are also of questionable value with respect to identifying and opposing a particular judicial philosophy. *See* Michael J. Gerhardt, *The Rhetoric of Judicial Critique: From Judicial Restraint to the Virtual Bill of Rights*, 10 WM. & MARY BILL RTS. J. 585 (2002):

> In the coming years, we can expect characterizing judicial ideology in the traditional terms of 'conservative,' 'liberal,' 'activist,' or adherence to 'judicial restraint,' to be of only limited utility. The first reason is ideological drift. In the world of constitutional law there are few fixtures. . . .
>
> Second, the fragmentation of liberalism has produced confusion and uncertainty about what exactly a contemporary 'liberal' judge would favor. . . . Moreover, . . . we can expect further fragmentation of conservatives. Splits likely will arise not only in how conservatives prioritize sources of constitutional authority, but also exacerbate divisions among libertarians, social conservatives, moral skeptics, and those who favor property rights and natural law.

*Id.* at 637–39.

148. Patricia Ewick & Austin Sarat, *Hidden in Plain View: Murray Edelman in the Law and Society Tradition*, 29 LAW & SOC. INQUIRY 439, 455 (2004) (citing JOHN B. THOMPSON, IDEOLOGY AND MODERN CULTURE (1990)). This definition, I recognize, has a bit of the Marxian about it. *See* Emery G. Lee III, *The Federalist in an Age of Faction: Rethinking Federalist No. 76 on the Senate's Role in the Judicial Confirmations Process*, 30 OHIO N.U. L. REV. 235, 244 (2004) ("Many . . . meanings [of ideology] emphasize the role of ideas in legitimating class or group interests. Karl Marx, for example, used the term to denote 'any ideas, however unsophisticated, that g[i]ve apparent validity and assumed authority to the claims that members of different classes might make when they pursue their various interests.'"). Other definitions are possible, but in my view, these are less interesting and offer less in the way of explaining the prevalence of threats of removal. *See, e.g., id.* at 244–45 (defining "ideology" alternatively as "a complete constellation of political ideas that explains political and social phenomena and provides a roadmap for political change").

be troubled by the act of threatening judges with removal; that threat, after all, is simply the first link in the chain that eventually results (or does not) in the removal of a judge from the bench. Impeachment and conviction without an antecedent threat to do so may well be logically impossible. But what if the threat to remove a federal judge was, as a rule, uncoupled with removal itself? In this situation, there would be few impeachments (as there are now), but frequent public, vocal threats of removal. Is this a probable occurrence?

One basis for the use of the threat as an instrument of social and political control was first developed by Thomas Hobbes.[149] Following Professor Robin West, I set out ("[j]ust to refresh recollection")[150] a passage of Hobbes's *Leviathan* to frame my contention:

> From this equality of ability, ariseth equality of hope in the attaining of our Ends. And therefore if any two men desire the same thing, which neverthelesse they cannot both enjoy, they become enemies; and in the way to their End, (which is principally their owne conservation, and sometimes their delectation only,) endeavour to destroy, or subdue one an other. . . .
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> . . . .
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> . . . For every man looketh that his companion should value him, at the same rate he sets upon himselfe: And upon all signes of contempt, or undervaluing, naturally endeavours, as far as he dares . . . to extort a greater value from his contemners, by dommage; and from others, by the example.
>
> So that in the nature of man, we find three principall causes of quarrell. First, Competition; Secondly, Diffidence; Thirdly, Glory.
>
> The first, maketh men invade for Gain; the second, for Safety, and the third, for Reputation. . . . [T]he third, [makes men violent] for trifles, as a word, a smile, a different opinion, and any other signe of undervalue, either direct in their Persons, or by reflexion in their Kindred, their Friends, their Nation, their Profession, or their Name.[151]

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149. Others have used the term, "threat expert" to describe Hobbes. *See* Martin Krygier, *Walls and Bridges: A Comment on Philip Selznick's The Moral Commonwealth*, 82 CAL. L. REV. 473, 479 (1994) (book review).

150. Robin West, *Reconsidering Legalism*, 88 MINN. L. REV. 119, 131 (2003).

151. THOMAS HOBBES, LEVIATHAN 87–88 (Richard Tuck ed., 1991) (1651). This tract immediately precedes Hobbes's most well-known description of the life of man in a state of nature—"solitary, poore, nasty, brutish, and short." *Id.* at 89.

It has been argued that the relationship between individuals in competition for power described by Hobbes has important implications in the context of employment discrimination.[152] "To deny employment . . . to those that seek it, is to Dishonour,"[153] and it is to be expected that many things that men desire and for which they compete and strive in the working world, either with fellow employees or with their employers ("trifles, as a word, a smile, a different opinion"), will drive men to violence (in the broad sense intended by Hobbes)[154] to obtain them. Only the "imperative law," backed by threat of retribution for noncompliance,[155] can guard against the natural inclinations of the employer toward preserving and expanding the ken of its control over the employed. Hobbesian "Honour" does not depend upon morality or whether an action is abstractly "just or unjust," but instead "consisteth onely in the opinion of Power."[156]

The connection I would draw to the relationship between our legislative and judicial branches is the following: The legislator and the judge perpetually vie for power, in that the judge applies and/or critiques (by striking down) the law created by the legislator for reasons that the legislator may not have intended, nor perhaps ever conceived, and the legislator reacts by recreating the law to suit his intention. In this manner, though the two operate on rather different planes, each branch exerts influence and is in a position of substantive oversight as to the other; thus, built into the political framework is the concept that neither branch wholly trusts the other

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152. *See* Richard H. McAdams, *Epstein on His Own Grounds*, 31 SAN DIEGO L. REV. 241, 248 (1994) ("We arrive then at a respectable and obvious Hobbesian argument for at least some employment discrimination laws: that to preserve social peace, members of one race should not be allowed to "dishonor" members of another race by certain acts of discrimination."). Title VII has also been criticized on the basis of its allegedly Hobbesian assumptions. *See* Reginald Leamon Robinson, *The Impact of Hobbes's Empirical Natural Law on Title VII's Effectiveness: A Hegelian Critique*, 25 CONN. L. REV. 607, 615–18 (1993) (arguing that Title VII would be more effective if it "reflect[ed] a person's inner subjectivity.").

153. HOBBES, *supra* note 151, at 65. Professor McAdams has suggested that though Hobbes likely did not intend "employment" in the modern business sense, "he meant that certain means of 'dealing' with others bestowed honor on them, while the parallel refusal to deal with them bestowed dishonor." McAdams, *supra* note 152, at 247 n.25.

154. McAdams elsewhere offers a convincing claim that Hobbes's reference to "violence" is not limited merely to "literal combat," but instead should be read to encompass "[s]tatus 'warfare'" or status competition. Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1075 (1995).

155. H. L. A. HART, THE CONCEPT OF LAW 16 (1961). Of course, in formulating his own theory of primary and secondary rules, Hart famously attacked the concept of law as mere orders backed by threats of violence. *Id.* at 77-96. This need not detain us, however, since the appeal of the notion of "the imperative law" here is its force in describing the psychological pressures attending the relationship between the legislator and judge, not its value as a general theory of law.

156. HOBBES, *supra* note 151, at 66.

to fulfill its obligations and each always suspects that the other will overstep the bounds of its powers given the right opportunity.[157] The conditions are ideal for Hobbes's mutual "diffidence."[158] In addition, however, the legislator is vested with the power to remove the judge—in essence, the legislator retains the employer's power of job termination with respect to the judge—while the judge is neither reciprocally authorized to remove the legislator nor, for that matter, retains any control at all over the legislator's job tenure.[159] It is a short step to conclude that since he is in competition with the judge and since he also has the power of impeachment, the legislator *qua* employer will use threats of removal (i.e., job termination) against the judge—thereby "dishonouring" the judge—in order to gain influence over the judge's decisions and "glory" in the form of additional coveted, substantive powers formerly possessed by the judge. The conclusion is fortified by the reality that Congress's decision to impeach, unlike all of its legislative decisions, is not subject to review of any kind;[160] judges have no political tools to

157. The close interaction between the legislative and judicial branches in modern times and the mutual mistrust such closeness invariably breeds is well described by Professor Geyh. *See* Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1223 (1996) ("If the prevailing view in Congress becomes that judges cannot be trusted to take principled, public-spirited positions in the legislative process, it is a short, logical step to say that they cannot be trusted to administer their own affairs or to decide cases in a principled, public-spirited manner, thereby necessitating heavy-handed oversight by the political branches."). Geyh argues that the traditional separation of powers paradigm that governs the legislative-judicial relationship has changed considerably since the early 1970s; judges are now much more involved as lobbyists and advocates for legislative change (particularly in statutory reform and rulemaking) than was once the case. *Id.* at 1168–71. This position adds strength to the claim that with an increased intertwining of branch roles will come a concomitant struggle for influence in overlapping spheres.

158. Hobbes's "diffidence" is a fear about one's own sense of security, which in turn impels an individual to act meanly toward his fellows in order to achieve a type of self-reassurance about his position. *See* HOBBES, *supra* note 151, at 87–88 ("And from this diffidence of one another, there is no way for any man to secure himselfe, so reasonable, as Anticipation; that is, by force, or wiles, to master the persons of all men he can, so long, till he see no other power great enough to endanger him[.]").

159. Once the President nominates a judicial officer, the legislator (this time the Senate) also has another "employment" power vis-à-vis that nominee: the power to hire (appoint). *See* U.S. CONST. art. II, § 2. And when the nominee is confirmed, Congress has the additional employment power of raising pay. Article III, section 1 only ordains that judicial compensation "shall not be diminished." Increases in judicial compensation, however, are within the legislature's bailiwick. *See* United States v. Will, 449 U.S. 200, 219–20 (1980) (citing THE FEDERALIST No. 79 (Alexander Hamilton), at 491–92 (1818) ("It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances; yet under such restrictions as to put it out of the power of that body to change the condition of the individual [judge] for the worse.")).

160. Michael J. Gerhardt, *The Lessons of Impeachment History*, 67 GEO. WASH. L. REV. 603, 604 (1999) ("[I]mpeachment judgments are, for all intents and purposes, final. Their legitimacy turns on the public's acceptance of Congress's actions and ultimately the judgment of history."); *see* Nixon v. United States, 506 U.S. 224, 231 (1993).

resist an impeachment.[161] In this sense, it is misleading to speak of the constitutional framework as comprised of three separate, co-equal branches, because the legislature's power of job termination over the judiciary threatens to trump all other divisions of power between those two branches.

Hobbes's views of the costs of a divided sovereignty are familiar; he clearly believed that only the state unified under a single and unchallenged power could avoid the type of inter-branch conflict inevitable in all other governmental forms.[162] It is not necessary, however, to accept Hobbes's centralized autocratic solution (and the relative powerlessness he envisions for his judiciary) in order to agree that his statement of the problem of shared governmental power has important implications for our constitutional system.[163] Isaak Dore suggests that the constitutional division of power between the executive and judicial branches creates just such conflict because "[u]nder a Hobbesian view, the most important issue is not whether the question is answered correctly, but that it be answered decisively."[164] Thus, according to Dore, executive review of judicial constitutional interpretation is "a step away from definitiveness in decision-making and hence problematic for social stability."[165] If that is true, there is even more reason to believe that similar conflicts will arise in the legislative-judicial relationship. Assuming that Congress is interested in both (1) creating laws that reflect the will of its constituents (i.e., that the "question is answered correctly," under Dore's formulation), and (2) legitimating and expanding the scope of its own law-giving and other powers while contemporaneously conveying to the public that its decisions are final and unassailable ("that [the question] be answered decisively"), its use of the impeachment threat against judges is a perfectly rational choice—one that arguably would conduce to greater social stability in that

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161. In keeping with this observation, Judge Panner noted that Congress passed the Feeney Amendment by employing "a procedure calculated to prevent the judicial branch from defending its interests via the political process. . . . The Judicial Branch cannot enact or veto legislation. It has no control over the budgets of the other Branches, or the power to nominate, confirm, or impeach their officials, or the power to conduct investigations and subpoena their officials to testify." United States v. Detwiler, 338 F. Supp. 2d 1166, 1178–79 (D. Or. 2004).

162. *See* HOBBES, *supra* note 151, at 127 ("[A] Kingdome divided in it selfe cannot stand."); *see also* Carl T. Bogus, *The Battle for Separation of Powers in Rhode Island*, 56 ADMIN. L. REV. 77, 87 (2004) (stating that Hobbes opposed the idea of separation of powers). Consistent with this view, incidentally, Hobbes believed that judicial officers should be subordinate to the sovereign—his "ministers"—and were not to be charged with any power to control the sovereign. HOBBES, *supra* note 151, at 168–70.

163. On the relevance of Hobbes's underlying themes in *Leviathan*—i.e., "Hobbesian harms" described in the state of nature—to various pockets or aspects of modern social practices and relationships (including those governed by the "Rule of Law," and therefore outside Hobbes's state of nature), see West, *supra* note 150, at 146–147.

164. Isaak Dore, *Inter-Branch Conflicts Under the Constitution of the United States: A Comment on Professor Goldstein's Paper*, 43 ST. LOUIS U. L.J. 853, 857 (1999).

165. *Id.*

ultimately it would centralize judicial power (or some judicial power) in the legislature.[166] It is no answer, moreover, that "[t]o construe the impeachment power to enable Congress to penalize or threaten federal judges because of nothing more than disagreement with their substantive decisions would . . . unnecessarily upset the balance of branch power."[167] That may well be true, but it merely raises the possibility that Congress's second posited aim—an increase in the scope of its powers with respect to those of the judiciary—might ultimately conflict with and overcome its first aim—the fulfillment of its legislative responsibility.

"Threat theory" is a term that could be used to characterize the psychological pressures attending the judicial-legislative relationship described above. Indeed, despite the visceral moral reaction generally evoked by the word "threat," its purposes are more rationally understood as an "actor's credible communication of interest, capacity, and contingent intention . . . designed to forewarn another actor that if it does not desist from or adjust certain behavior, more destructive instruments will be applied."[168] In the context of threats of removal from the bench, what makes such threats effective is not the actual prospect of impeachment, but instead the fear of the possibility (however actually remote) of removal—"the exploitation of potential force."[169] To a significant degree, therefore, it matters psychologically much less whether or not the threat of impeachment is carried out than that it was made at all. As Professor Cross has observed:

> If Congress and the courts are playing a game of "chicken" to control doctrine, one does not need an actual car crash to demonstrate an effect from the threat of impeachment.
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> . . . .
>
> The threat of impeachment has significance even beyond face value and beyond the particular judge threatened with impeachment. A threat may form a part of the complex interaction of relations between legislature and judiciary. It may simply be a form of signaling

166. H. L. A. Hart emphasizes a similar point when, commenting on the thought of Hobbes, he states that the sovereign's authority is intended "to preclude or cut off any independent deliberation by the hearer of the merits pro and con of doing the act." H. L. A. HART, ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY 253 (1982).

167. Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. CAL. L. REV. 673, 690 (1999).

168. W. Michael Reisman, *Assessing the Lawfulness of Nonmilitary Enforcement: The Case of Economic Sanctions*, 89 AM. SOC'Y INT'L L. PROC 337, 351 (1995).

169. *See* THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 5 (1963).

> legislative displeasure with doctrinal action and may carry the veiled threat of a variety of other attacks on the Court . . . . Threatening impeachment is effective in that it targets a particular judge or decision that has aroused Congress's wrath and informs the Court about congressional preferences on a particular issue and their relative salience.[170]

Given both the power structure between the legislative and judicial branches and the approach taken by many in the House of Representatives in pushing forward particular agendas, there is every reason to suppose that as those programs are met with judicial resistance, judges should expect threats of removal from the legislature with increasing frequency.

But there is nothing novel in such a theory. Hobbes, after all, wrote well over a century before the Republic's founding, and judges and legislators have had intercourse and disagreement ever since. If threat theory can plausibly explain the reasons for legislative use of threats of removal against judges, it cannot account for an increased prevalence of such threats in *today's* legislative-judicial relationship. Only a theory that identifies something distinctive about the modern state of affairs will suffice for that purpose.

### B. CULTURE OF CRITICISM: THE POLITICAL CONSEQUENCES OF OVERABUNDANCE

Judge Posner has observed that "[e]xceptionally able judges arouse suspicion of having an 'agenda,' that is, of wanting to be something more than just corks bobbing on the waves of litigation or umpires calling balls and strikes."[171] His metaphor applies to the exceptionally able and the ordinary alike and illustrates the general public diffidence about the capacity of judges to make decisions that will be respected and recognized as legitimate. That distrust has political consequences. Congress has seized upon an increasing public faithlessness as to the legitimacy of the grounds upon which judges judge in order to advance legislators' own political ends. These efforts have proven successful because Congress has recognized that public criticism of the judiciary not only has become more prevalent and popular than ever before, but that it is also unlikely to diminish. Congress has and will continue to capitalize on this widespread cultural embrace of judicial criticism as a social

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170. Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1461–62 (2001).

171. RICHARD A. POSNER, OVERCOMING LAW 110 (1995).

virtue in order to increase the scope of its powers over the judiciary—which is the real aim of legislation such as the Feeney Amendment and Resolution 568.

Is there evidence of such widespread and mounting interest in criticizing the judiciary? Some argue that just the opposite is true. In a recent article entitled "Culture of Quiescence," Professor Carl T. Bogus argues that there is "a strongly enforced taboo within the . . . legal culture against criticizing the state's governmental institutions, particularly its courts." [172] Though Bogus concentrates specifically on what he believes is a local problem, his larger theme (and what is of interest here) deals with the necessity of subjecting the judiciary at large to constant and vociferous criticism. "People who are overly protected from criticism," he contends, "come to a bad end," and no public servant is more likely to suffer from a lack of regular inoculations of public criticism than the judge.[173] Lawyers dealing with judges "bow and scrape," law clerks are "awestruck," and only few brave souls muster the gumption to "tell a judge she is wrong."[174] The eventual result of such pervasively fawning treatment, Bogus argues, is the manifestation of "black robe disease," whose symptoms—impatience, disdain, cantankerousness—are brought on by the judge's belief in his own omniscience.[175]

Professor Bogus's basic point is that the judiciary needs more critics and more outspoken, unabashed criticism—"a healthy debate on the merits" of the individual decisions judges make.[176] Such criticism, which is in vast undersupply in his view, is vitally necessary because "an institution that cannot tolerate criticism is inherently unhealthy. A lack of criticism leads inevitably to distorted self-perceptions. An institution that cannot hear criticism will lose opportunities to correct errors and improve . . . ."[177] Similar points about the value of lawyers' criticism of the judiciary have been made by Professor Monroe Freedman, who claims that lawyers "are particularly knowledgeable about judges' conduct, and are therefore in a position to inform the public about abuses of judicial power."[178] For Bogus, the present state of affairs is a general systemic malady:

> [T]he problem is not limited to federal district court. This is a problem in the wider professional culture—a culture

172. Carl T. Bogus, *Culture of Quiescence*, 9 ROGER WILLIAMS U. L. REV. 351, 353 (2004).

173. *Id.* at 352.

174. *Id.*

175. *Id.* at 353.

176. *Id.* at 372.

177. *Id.* at 394.

178. Monroe H. Freedman, *The Threat to Judicial Independence by Criticism of Judges—A Proposed Solution to the Real Problem*, 25 HOFSTRA L. REV. 729, 730 (1997).

> that equates disagreement with confrontation, institutional criticism with ad hominem attack, and anything that even smacks of personal criticism with contemptuousness. These are self-defeating responses.
>
> Federal district judges . . . are well armored against a critic's arrows. They have life tenure. They do not need to worry about the next election; the ebb and flow of popularity need not concern them. Indeed, popularity cannot, and should not, concern them at all.
>
> . . . .
>
> Hypersensitivity to criticism is counterproductive. As everyone understands, thin skin is a characteristic of the insecure.[179]

There are, of course, numerous generally accepted truths about the value of criticism: that one should be willing to listen to criticism; that criticism, properly understood and assessed, stimulates and promotes self-improvement; that those who are unwilling to hear criticism do themselves a disservice, and so on. Criticism is also rightly valued from the perspective of the speaker. The freedom to criticize at will is a hallmark of an open society. We value uninhibited criticism for what it represents about our capacity to tolerate differing views, even if we recognize that those views vary greatly in worth. In the above cited paragraph, Bogus seems to be arguing that these bromides about the unassailable righteousness of criticism apply wholesale to the judiciary, but he does little in the way of explaining why criticism is so very necessary for the improvement of the judiciary as an institution or for individual judges; he simply accepts the proposition that criticism is of unquestionable value and chastises judges for being overly sensitive to it (and lawyers for not doing enough of it).

In fact, superabundant criticism is not an unmitigated good; to argue otherwise is not to take a realistic and complete view of criticism's power. Alongside the bevy of social virtues should be listed criticism's negative qualities and consequences: criticism is destabilizing; criticism can corrode institutional and social foundations; criticism can be self-serving, mean-spirited, lacking in depth, and motivated by something quite other than the improvement of the criticized.[180] These darker sides to criticism are

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179. Bogus, *supra* note 172, at 392–93.

180. *See* James Boyd White, *Free Speech and Valuable Speech: Silence, Dante, and the "Marketplace of Ideas,"* 51 UCLA L. REV. 799, 813 (2004):

> The standard ideology of free speech assumes as its model an independent-minded individual who is speaking unwelcome truths to the world, resisting power, and competing with others in an open market that will test both fact

just as germane as its legitimate benefits to a full understanding of criticism's social impact.

The more substantial point, however, is that the destructive power of criticism is of particular relevance to the judicial institution. Judges are charged to resolve disputes—in effect, to put an end to the exchange of critical and opposing points of view—and their authority is premised in large measure on the perceived legitimacy of their decisions. "Perceived legitimacy" because whether or not a particular decision is ultimately correct (i.e., "based on the law," if that is capable of definition) or even fair is not necessarily the most vital measure of the judicial institution's strength. Rather, the judiciary is most successful in fulfilling its duties when the public whom it serves believes profoundly in the authority of judges to make decisions that will affect the public, even if adversely. When that authority is tarnished too much, or disprized, or criticized, it becomes impossible for judges to perform their function and, indeed, for a society to have judges, because the respect necessary to legitimate decisions ceases to exist. If judges are sensitive to criticism, it should not automatically be supposed that "black robe disease" is setting in (although that possibility should be considered). That sensitivity is instead at least as readily attributable to the especially problematic role that criticism of a particular judge plays in the weakening of the judicial institution in the eyes of the public.

Professor Bogus cites to a tract from Justice O'Connor's opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, but the passage he offers does not clearly support his argument: "The [Supreme] Court's power lies . . . in its legitimacy, a product of substance *and perception* that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands."[181] The public perception of

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> and value. It is with such speakers that we easily identify; it is they whose right to say what we detest we would die to defend. But very little of the speech that makes up our shared world takes this form. Rather, the bulk of our public speech is commercially and politically driven . . . .

181. 505 U.S. 833, 865 (1992) (emphasis added). The context for the quote is a discussion of the problems of perceived legitimacy that attend overruling prior Supreme Court precedent. Justice O'Connor continued:

> Some cost will be paid by anyone who approves or implements a constitutional decision where it is unpopular, or who refuses to work to undermine the decision or to force its reversal. . . . An extra price will be paid by those who themselves disapprove of the decision's results when viewed outside of constitutional terms, but who nevertheless struggle to accept it, *because they respect the rule of law.*

*Id.* at 867–68 (emphasis added).

More in keeping with Bogus's position are these comments of Justice Black:

the Supreme Court's legitimacy is not driven by society's general understanding or approbation of the decisions reached by the Court. It does not, therefore, depend on the public's satisfaction that the Court's legal conclusions are sound or that its opinions are well-reasoned; rhetorically persuasive, or analytically comprehensive.[182] If criticism of this kind is to be offered, it is the law scholar, practicing specialist, or fellow judge that is in a position to do so because such criticism (if it is worth listening to) requires not only a reaction to the result reached, but also, and more importantly, the technical and educational background to assess the reasoning and argument deployed to reach the result.[183]

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> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

Bridges v. California, 314 U.S. 252, 270–71 (1941). Justice Black, an avowed First Amendment absolutist (*see* Beauharnais v. Illinois, 343 U.S. 250, 275 (1952) (Black, J., dissenting) (stating that "the First Amendment, with the Fourteenth, 'absolutely' forbids [laws that abridge free speech] without any 'ifs' or 'buts' or 'whereases'")), most assuredly believed in the beneficent power of criticism. But just as there are less than altruistic reasons to give criticism, there are similarly cynical reasons to accept it. It is in a judge's self-interest to profess his receptivity to criticism; it gives the judge an aura of openness and strength that a professed sensitivity to criticism would not. The flaw in Justice Black's reasoning is that the degree of resentment, suspicion, and contempt a society feels for its judiciary does not necessarily correlate inversely to the amount of criticism leveled against the judiciary. Conversely, a society that heaps criticism on its judiciary does not thereby demonstrate its greater respect.

182. This is in large part because most people don't know what judges do. *See* Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 317 & n.7 (1999) (citing to various studies for the proposition that the public has an "abysmal knowledge base about the judiciary"); *see also* Roscoe Pound, *The Causes of Popular Dissatissfaction with the Administration of Justice*, Address at the Convention of the American Bar Association (Aug. 26, 1906), *printed in* 35 F.R.D. 273, 289 (1964) (citing as a reason for the public's distrust of the judicial system, the "public ignorance of the real workings of courts due to ignorant and sensational reports in the press"); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1304–05 (2004) ( "Decades of research on political knowledge have uniformly showed it to be very low. . . . For example, the majority of American adults do not know the respective functions of the three branches of government . . . ."); Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 52 (2003) (observing that in States with judicial elections, the "Axiom of 80" applies, which includes the following: "Roughly 80% of the electorate does not vote in judicial elections; . . . Roughly 80% of the electorate cannot identify the candidates for judicial office; . . . Roughly 80% of the public believes that when judges are elected, their decisions are influenced by the campaign contributions they receive.").

183. A similar point has been made by Professor White:

> When we turn to a judicial opinion, then, we can ask not only how we evaluate its "result" but, more importantly, how and what it makes that result mean, not only for the parties in that case, and for the contemporary public, but for the future: for each case is an invitation to lawyers and judges to talk one way rather than another, . . . to give one kind of meaning rather than another to what they do, and this invitation can itself be analyzed and judged.

Instead, the public perception of judicial legitimacy, when it exists, stems from a deep-seated, historic trust that the Supreme Court (or any other court) is correct *because it is the Court*, and therefore the final and most credible voice on the law.[184] To return to Hobbes, "[i]t is not Wisdom, but Authority that makes a Law."[185] Without an intrinsic cultural faith in the "rightness" of the judiciary, borne of the traditional place in the collective consciousness of the judiciary as the final authority over matters legal, courts cannot maintain their lofty status in the perception of those whom they serve but who often may not understand what the courts do.[186] And this remains true irrespective of how receptive courts may be to criticism—even criticism whose aims are purely altruistic—of the decisions they reach in any given case or circumstance.[187]

Bogus too easily dismisses the damage that criticism can inflict on the judiciary: "[t]hey have life tenure. . . . Courts can take care of themselves."[188] Life tenure, as we have seen, is one of the mechanisms that renders the process of impeachment and conviction procedurally complicated. I would hazard that for most judges, the security of life tenure is not a narcotic that numbs the sense of responsibility to perform one's offices properly, nor is it remotely

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James Boyd White, *Judicial Criticism*, 20 GA. L. REV. 835, 847 (1986).

184. *See Planned Parenthood*, 505 U.S. at 868:

> Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding *of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals.*

(emphasis added).

185. THOMAS HOBBES, A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND 55 (Joseph Cropsey ed., 1971) (1681).

186. Indeed, legitimacy based on authority has independent force from legitimacy rooted in reason and understanding. *See* DAVID P. GAUTHIER, PRACTICAL REASONING: THE STRUCTURE AND FOUNDATION OF PRUDENTIAL AND MORAL ARGUMENTS AND THEIR EXEMPLIFICATION IN DISCOURSE 139 (1963) ("An appeal to authority—to requirements imposed by authority—is an alternative to an appeal to reason—to requirements based on reasons for acting."). This is not at all to say that one mutually excludes the other; in fact, the two types of legitimacy may well be complementary.

187. I am not insensitive to the point that criticism of the judiciary comes in various forms and can be more or less salutary or virulent. *See* Thomas L. Jipping, *Legislating from the Bench: The Greatest Threat to Judicial Independence*, 43 S. TEX. L. REV. 141, 156 (2001) (arguing that it is necessary to distinguish between categories of judicial criticism in order to assess their respective impact). But the point I wish to make—that criticism in whatever form has intrinsic harmful (as well as helpful) tendencies toward the legitimacy of the judiciary, and more importantly, that there is judicial criticism (good, bad, and ugly) in overabundant supply—does not depend on this distinction.

188. Bogus, *supra* note 172, at 392, 394.

sufficient, of itself, to guarantee a well-functioning judiciary.[189] It is true that life tenure is one of the few constitutionally prescribed prophylactics supporting the judiciary's independence. But that does not mean that the constitutional justifications for judicial independence are necessarily circumscribed by arguments to be drawn exclusively from the "good behavior" clause. Proponents of this type of purely textualist understanding of judicial independence

> posit[] the existence of a constitutional scheme so incomplete that the capacity of individual judges to decide cases without intimidation, and of the judicial branch to preserve its institutional integrity, is left to dangle by the thread of legislative sufferance—a state of affairs that is difficult to reconcile with the framers' emphatic support for judicial independence.[190]

Moreover, for Bogus to cite life tenure, in isolation, as a reason that we should not worry or care about the way we criticize the judiciary highlights his inherently combative perspective: he seems to be advocating some kind of cultural upheaval within the legal profession and society at large against the judiciary.[191]

Whether or not one agrees that criticism of the judiciary is unqualifiedly desirable, it is something else to accept the contention that we live in a society and an era where such criticism is in insufficient supply. In fact, this is not the case at all; criticism of individual judges and the judiciary generally is in its golden age. There are numerous surveys reporting on the public's discontent with

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189. The successful judiciary requires a good deal more tending. Professor Redish has divided the concept of "judicial independence" into categories: "institutional" independence, "lawmaking" independence, "counter-majoritarian" independence, and "decisional" independence. *See* Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 698 (1995). Tenure protection is only one facet of "institutional independence." *Id.* at 700–03. *See also* John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 965 (2002) ("Everyone agrees that we need 'decisional independence,' meaning judges' ability to adjudicate facts and interpret law in particular cases 'free from any outside pressure: personal, economic, or political, including any fear of reprisal.'") (citing Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565, 566 (1996)).

190. Geyh, *supra* note 24, at 161–62.

191. Bogus, *supra* note 172, at 396 ("Rhode Island and her citizens . . . would benefit from culture change. . . . Rhode Island lawyers live in a culture in which criticism is considered professional treason . . . . Lawyers must become critics . . . . There is strength in numbers . . . ." Bogus also notes: "The state needs Rhode Island lawyers to be public critics of those aspects of the judicial system they find wanting. From the many comments made to me, I know that Rhode Island lawyers recognize that their professional community is plagued by the taboo against criticism. Many have told me they are happy that there is now a law school in the state to critique the judiciary. My colleagues will do their part, but it is a mistake to count on us alone.").

judges and the state of the judiciary;[192] the national debate rages like never before on the meaning and importance of judicial independence and accountability with arguments for and against criticism of the judiciary and individual judges abounding;[193] bar

192. *See, e.g.*, Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective On Civil Procedure Reform*, 45 AM. J. COMP. L. 871 (1997):

> During the past several decades there has been an increase in research exploring the subjective evaluations of those people who deal with the legal system.
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> . . . .
>
> Recent public opinion polls provide evidence that dissatisfaction with the legal system is widespread and that the public generally holds lawyers and judges in low regard. . . . For example, during the period of 1972 to 1987, only 30–40% of Americans were found to express 'a great deal of confidence in the Supreme Court as in institution of government' (National Opinion Research center, General Social Survey).
>
> Further, on the local level, the public is found to express wide spread dissatisfaction with local courts, in particular the criminal courts . . . . For example, national surveys indicate that between 1970 and 1990 around 80% of adult Americans indicated that the courts are 'too lenient' on criminals. The public faults courts on a variety of grounds, including the failure to control crime, too much leniency, letting too many criminals escape on 'technicalities,' making too many erroneous judgments, and giving defendants too many rights (e.g., the exclusionary rule). While these grievances are directed at issues of criminal law, there is no evidence that the public distinguishes the handling of criminal and civil cases.

*Id.* at 871–72; *American Bar Association Report on Perceptions of the U.S. Justice System*, 62 ALB. L. REV. 1307, 1320–21 (1999) (surveying public opinion with respect to a variety of issues including numerous questions on attitudes and beliefs about the judiciary and finding that "50% of the respondents said they are extremely or very confident in the Supreme Court [but] [i]nterestingly, only 34% said the same of the federal courts"); Geyh, *supra* note 157, at 1167:

> Throughout this assault [beginning in the 1970s] on the competence and credibility of the first two branches of government, the judiciary has maintained a low profile and escaped relatively unscathed. That, however, may be changing. In the wake of public frustration with the management of the Rodney King and O.J. Simpson trials, commentators have begun to suggest that post-Watergate cynicism is finally catching up with the judiciary.

193. In the past ten or so years alone, law school symposia and conferences on the many and complex facets of "judicial independence" and "judicial accountability" are too numerous to list in full. *See, e.g.*, the University of Richmond Allen Chair Symposium 2003: Independence of the Judiciary (2003); Ohio State University's Symposium on Perspectives on Judicial Independence (2003); Fordham University's "Special Series: Judicial Independence" (2002); the University of Pennsylvania's Conference on Judicial Independence at the Crossroads: Developing an Interdisciplinary Research Agenda (2001); the University of Southern California's Judicial Independence and Judicial Accountability Symposium (1998); Georgia State University's Symposium on Judicial Review and Judicial Independence: The Appropriate Role of the Judiciary (1998); Hofstra University's Symposium on Judicial Independence (1997); the University of Dayton's Symposium on International Law and Judicial Autonomy (1996); Mercer Law School's Symposium on Federal Judicial Independence (1995); the University of Pennsylvania's "Disciplining the Federal Judiciary" series (1993).

There is even a separately published bibliographical collection of materials (listing scores of books, articles, reports, etc.) that addresses judicial independence and accountability. Many of these deal with the proper role of criticism of judges and the judiciary. *See* Amy B. Atchison, et al., *Judicial Independence and Judicial Accountability: A Selected Bibliography*, 72

associations and other attorney organizations have formed commissions in response to the tidal wave of public criticism directed at judges and have issued a host of reports on the state of public confidence in the judiciary;[194] the media have taken an unprecedentedly aggressive role in criticizing judges and their decisions;[195] and judges themselves have become far more outspoken critics of their colleagues than ever before.[196]

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S. CAL. L. REV. 723 (1999). Surely scores more have accreted since 1999, as evidenced by the extraordinarily rich quantity of recent scholarship in this area.

194. *See, e.g.*, AM. BAR ASS'N COMM'N, AN INDEPENDENT JUDICIARY: REPORT OF THE COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE EXECUTIVE SUMMARY (1997) ("A new cycle of intense political scrutiny and criticism of the judiciary is now upon us." "If Congress and the courts do not cooperate in a constructive and restrained manner, public confidence in the judiciary will be adversely affected. . . . Public support for the judicial system is perceived to be in a dangerous state of decline."); BOSTON BAR ASS'N JUDICIAL RESPONSE TASK FORCE REPORT (2003) ("Over the past several years, judges in the Commonwealth of Massachusetts as well as around the country have come under increased criticism in the media and among members of the public for their decisions and orders. This denigration of the courts undermines the public's respect for our judicial system, and is often based on a misunderstanding of either the judicial process or the facts of a particular case."); *2 Panels to Review Criticism of Judges*, N.Y. L.J., Sept. 30, 1996, at 2; D. Dudley Oldham & Seth S. Andersen, Commentary, *The Role of the Organized Bar In Promoting an Independent and Accountable Judiciary*, 64 OHIO ST. L.J. 341 (2003):

> The organized bar has a long history of promoting an independent and accountable judiciary. Lawyers and judges have led efforts to improve judicial selection methods, establish codes of conduct and ethics, and promote public trust and confidence in the judiciary.
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> . . . .
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> Lawyers and judges have also taken the lead at the state and federal levels in designing and administering rules and programs to promote accountability of judges to the public they serve. Bar polls, judicial performance evaluation programs, and codes of conduct and ethics for judges are just a few examples of the means by which lawyers seek to temper the independence of the judiciary with a healthy and appropriate dose of accountability.

*Id.* at 341–42.

Bogus himself speaks admiringly of the Philadelphia bar as willing "to speak out collectively and publicly about perceived problems in the administration of justice, whether by the courts or other instruments of government." Bogus, *supra* note 172, at 353.

195. *See, e.g.*, MAX BOOT, OUT OF ORDER: ARROGANCE, CORRUPTION, AND INCOMPETENCE ON THE BENCH (1998) (Boot, a writer for the Wall Street Journal, offers a plethora of often contemptuous criticism against an assortment of judges); MARK KOZLOWSKI, THE MYTH OF THE IMPERIAL JUDICIARY: WHY THE RIGHT IS WRONG ABOUT THE COURTS (2003); Richard E. Morgan, *Grasping At Straws*, CLAREMONT REVIEW OF BOOKS, Summer 2004, at 53 (book review of THE MYTH OF THE IMPERIAL JUDICIARY: WHY THE RIGHT IS WRONG ABOUT THE COURTS) ("Readers of this journal are familiar with the withering criticism, more acute every year, directed at the judicial adventurism that has been, since the Warren Court, a growing pathology in American governance."); Patrick M. Garry, *The First Amendment in a Time of Media Proliferation: Does Freedom of Speech Entail a Private Right to Censor?*, 65 U. PITT. L. REV. 183 (2004):

> With respect to the electronic media, much of the First Amendment case law has been based on a concern with scarcity. . . . To address this concern for scarcity of voices, the marketplace metaphor was applied. However, lost in all the obsession with scarcity was the reality of what was taking place within America's media. An overload of consumer information and

We are at a considerable distance from Professor Bogus's lamentable state of an imperious, scornful, and craven judiciary whose decisions are shielded from criticism at every turn by an obsequious, servile public. Our condition is much more convincingly described in a recent article by Justice Margaret Marshall of the Massachusetts Supreme Judicial Court.[197] In analyzing the effects of *Bridges v. California*,[198] where the Supreme Court overturned contempt sanctions imposed on a labor leader and a newspaper that had publicly criticized the judge's decision in a pending case, Justice Marshall observed that:

> American jurisprudence concerning scandalising the court departed sharply from the path of English common law. It has never looked back. With what consequences? On the most tangible level, *Bridges* and its progeny have allowed the live practice of justice to unfold before the American people in all of its raw immediacy and sometimes manipulative theatricality. Press conferences on the courthouse steps, in front of a mountain of microphones, are now common fare on American newscasts. Our airwaves crackle with programs that purport to bring gavel-to-gavel trial coverage to the public. Instant telephone polls and Internet chat rooms augment the telecasts, allowing viewers to vote on,

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entertainment was drowning out just the kind of political and public affairs dialogue the First Amendment values most.

*Id.* at 187.

Whether or not one agrees with Professor Garry, the amount of media coverage that is critical of the judiciary (written and oral decisions, conduct on and off the bench, qualifications for appointment, personal habits, etc.) is staggering. In addition to the profusion of coverage in the print media, electronic media have exponentially increased the quantity of reporting and criticism of matters judicial.

196. *See generally* William G. Ross, *Civility Among Judges: Charting the Bounds of Proper Criticism By Judges of Other Judges*, 51 FLA. L. REV. 957, 958–72 (1999). Professor Ross writes that criticism of judges by other judges has recently increased in four distinct areas: "bilious written opinions"; "public comments about specific judges or their decisions"; criticism of particular courts; and private comments about fellow judges. In the context of judicial elections (which occur in 38 of 50 states), the Supreme Court has removed essentially all impediments to free speech for judicial candidates. *See* Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002) (holding that a state forfeits its interest in the appearance of an impartial judiciary when it decides to elect its judges; consequently, states must permit judicial candidates to exercise their full free speech rights under the First Amendment); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 725-26 (1995). Judicial campaign speech and reciprocal criticism of candidates for elected judicial office is in plentiful abundance. *See, e.g.*, Hon. Penny J. White, *Preserving the Legacy: A Tribute to Chief Justice Harry L. Carrico, One Who Exalted Judicial Independence*, 38 U. RICH. L. REV. 615 (2004); Geyh, *supra* note 182, at 49–50.

197. *See* Hon. Margaret H. Marshall, *Dangerous Talk, Dangerous Silence: Free Speech, Judicial Independence, and the Rule of Law*, 24 SYDNEY L. REV. 455 (2002).

198. 314 U.S. 252 (1941).

> among other things, whether the accused should be found guilty. The coverage is not only national but international.
> But more important than feeding America's voyeuristic, 'prurient culture,' *Bridges* and the cases that have built on it have laid the American judiciary open to the unrelenting scrutiny of the public, which, more often than not, means the scrutiny of the media. Some of this criticism has been polite and restrained; some quite the opposite.[199]

Thus while criticism of the judiciary is a time-honored American tradition, the advent of technologies that carry critical commentary about the judiciary with increasing frequency and speed is a phenomenon of the latter decades of the twentieth century. As Garry states, "[m]odern information technology offers not only more speech, but more ways to deliver that speech."[200] By virtue of these advances in communication, there is more criticism of the judiciary simply because there are more people with access to it, and therefore more people doing and responding to it.[201] Thus, criticism of the judiciary has expanded to a much broader range of listeners and participants than has ever before been the case; moreover, this expansion is not mirrored by a concomitant increase in public understanding of the judicial function.[202] The result has been a general coarsening of the quality and an exponential intensification of the quantity of judicial criticism.[203]

What political consequences, if any, follow from this overabundance of public criticism? Congress surely has not been oblivious to the increased prevalence and perceived desirability of unfettered judicial criticism. The congressional measures discussed in this article (and many others that aim to curtail judicial powers) purportedly are rooted in the public's suspicion toward and resentment against the judiciary.[204] In fact, the terrain of public

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199. Marshall, *supra* note 197, at 458.

200. Garry, *supra* note 195, at 183; *see also* Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1833 (1995) (arguing that the "infobahn" made possible by new technologies will "democratize the information marketplace—make it more accessible for comparatively poor speakers as well as rich ones—and diversify it").

201. Garry, *supra* note 195, at 194.

202. *Id.* at 208 ("Nor has the abundance [of speech and criticism made possible by the media] automatically led to a more informed and analytical citizenry, nor to a greater diversity of viewpoints.").

203. Again, I would emphasize that I do not claim that all criticism of the judiciary is undesirable, and I recognize that certain criticism is helpful and to be solicited. My point is that the sheer volume of judicial criticism (of all kinds) for its own sake is of debatable social and institutional value.

204. *See* 150 CONG. REC. E426 (daily ed. Mar. 23, 2004) (statement of Rep. Feeney) (stating that the Feeney Amendment "represents a legislative response to long-standing

opinion has never been more fertile for the congressional power-plays exemplified by legislation such as the Feeney Amendment and Resolution 568. The popularity and profusion of judicial criticism, peaking, as it has, relatively recently, has enabled Congress to brandish its impeachment powers against the judiciary with far less restraint than it once could have. Thus, this culture of criticism renders possible (or at the very least greatly facilitates) Congress's deployment of threat theory against judges.[205] More than the advancement of any particular set of beliefs ("conservative" or "liberal"), the combination of widespread public criticism and the legislative will to control the judiciary by stripping away and absorbing traditional judicial functions, motivates Congress's threats to remove judges—itself an acute form of judicial criticism.[206]

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Congressional concern that the Sentencing Guidelines were increasingly being circumvented by some federal judges," and emphasizing Congress's oversight responsibilities as the rightful duty of the "elected representatives of the people"); *Hearing on H.R. Res. 568, supra* note 113, at 8–9 (Congressman King roots the impetus for Resolution 568 in the public's disaffection with the judiciary by asking, "[I]f we are going to go down the path of . . . judicial activism, that sees the future of America in a fashion that's not accountable to the voice of the people, like we have to be, if we go down that path, what does the Constitution mean?").

205. Chief Justice Rehnquist gestured in the direction of this claim when he recently stated:

> Although arguments over the federal Judiciary have always been with us, criticism of judges, including charges of activism, have in the eyes of some taken a new turn in recent years. I spoke last year of my concern, and that of many federal judges, about aspects of the PROTECT Act that require the collection of information on an individual, judge-by-judge basis. At the same time, there have been suggestions to impeach federal judges who issue decisions regarded by some as out of the mainstream. And there were several bills introduced in the last Congress that would limit the jurisdiction of the federal courts to decide constitutional challenges to certain kinds of government action.

CHIEF JUSTICE WILLIAM H. REHNQUIST, 2004 YEAR-END REPORT ON THE FEDERAL JUDICIARY (Jan. 1, 2005), *available at* http://www.supremecourtus.gov/publicinfo/year-end/2004year-endreport.pdf.

206. The declining regard of the public for the judiciary may in some ways be fueled by political attacks on judges, as much as it incites such attacks. Perhaps the most extreme form such criticism can take is as a physical attack on a judge or her family. *See* Deborah Sontag, *In Courts, Threats Become Alarming Fact of Life*, N.Y. TIMES, Mar. 20, 2005, at A23 ("Judge John Hill, a senior appellate justice in Texas who was shot in his courtroom in 1992 during a child custody case, said he worried about 'the general encouragement of ill feeling against the judiciary.' Several other judges also expressed concern about the sharp language used to denounce so-called activist judges. 'I don't know if it has any effect, but there are a lot of political attacks on judges today,' Judge Hill said."). Naturally, no one in Congress has physically threatened a judge, and there is a chasm of difference between verbal criticism and physical threat. Neither, however, should a culture that encourages and glories in the vilification of its judiciary be entirely surprised when episodes of judicial criticism take violent shape.

In fact, there is mounting evidence that certain members of Congress are not only unsurprised at such attacks, but are also eager to use demonstrations of physical force against the judiciary for their own ends. In a speech on the Senate floor, Senator John Cornyn of Texas cited recent examples of violence toward judges and their families as an example of an understandable public anger toward judges who make politically charged decisions: "I don't

It is at this juncture that one might ask what can be done to improve matters.[207] Justice O'Connor's observations about the dim state of relations between the judicial and legislative branches, the starting point for this article, are not encouraging. Many (and judges especially) urge that greater "education" is the panacea. According to this view, if the public is to have confidence in the judiciary, serious and wide-ranging pedagogical reforms are in order: the public must be informed (and kept knowledgeable) about the role of the judiciary, its place in our government, the rules governing the conduct of judges, and so on.[208] With apologies to deliberative democracy enthusiasts,[209] I am skeptical of this claim. Advocates of

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know if there is a cause-and-effect connection, but we have seen some recent episodes of courthouse violence in this country. . . . And I wonder whether there may be some connection between the perception in some quarters, on some occasions, where judges are making political decisions yet are unaccountable to the public, that it builds up and builds up and builds up to the point where some people engage in . . . violence." Charles Babington, *Senator Links Violence to 'Political' Decisions*, WASH. POST, Apr. 5, 2005, at A7 (reporting the comments of Senator John Cornyn). Though the Senator did allow that criminal attacks against judges are "[c]ertainly without any justification," he made clear that he was not altogether unsympathetic with the righteous indignation of the American public against "activist" judges. *Id.* Senator Cornyn may have a point, but it is not the one he wished to make. After all, the two episodes of violence toward the judiciary he relies on cannot fairly be said to have been motivated in the least by political disagreement. Still, Senator Cornyn makes plain that Congress and the public are engaged in a reciprocal process of ratcheting up hostility toward the judiciary. It is in Congress's interest to see to it that the public's anger and criticism is as hot as possible. The public responds to the rhetoric of the legislature, just as the legislature reacts to the public mood.

207. By "improve matters," I mean alleviate the current inter-branch tension. Another question, "Should congressional threats of removal against the judiciary be of any concern (or, alternatively, should we be happy about them)?", is also worth considering. However, since the aims of this article are to establish that such threats are increasing in prevalence, to explain how and why that is the case, and to argue that the state of relations between Congress and the judiciary will continue to deteriorate as a result, that question will not be addressed here.

208. *See, e.g.*, Hon. Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 HOFSTRA L. REV. 703, 727 (1997) ("[T]he time has come for justice system insiders to take a much more aggressive role in the area of public relations, especially public education. Essentially, we need to find ways to work with the media, with the public at large, and with the school population."); Hon. Bruce M. Selya, *The Confidence Game: Public Perceptions of the Judiciary*, 30 NEW ENG. L. REV. 909, 913 (1996); Hon. Shirley S. Abrahamson, *Courtroom with a View: Building Judicial Independence with Public Participation*, 8 WILLAMETTE J. INT'L L. & DISP. RESOL. 13, 25–26 (2000); Penny J. White, *Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations*, 29 FORDHAM URB. L.J. 1053, 1064 (2002) (Former Tennessee Supreme Court Justice White contends that the public must become more active in "gather[ing] information about judicial performance from the citizen's point of view"). Justice O'Connor seems to advocate a didactic approach toward legislators: "Try to make a friend out of the members of Congress . . . . Try to help them understand the needs of judges. It's much harder to turn a cold shoulder on someone you know." *See* O'Connor, *supra* note 1.

209. Much has been written about the role that public deliberation and debate play (or should play) in the democratic process. *See, e.g.*, Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, *in* PHILOSOPHY AND DEMOCRACY: AN ANTHOLOGY 17 (Thomas Christiano ed., 2003):

> The deliberative conception of democracy is organized around an ideal of political justification. According to this ideal, justification of the exercise of collective political power is to proceed on the basis of a free public reasoning

this type of public education are grossly oversimplifying matters. There are parallels with other social institutions and professions (medicine, law, government, education, business, etc.) that make this plain. The siege of public criticism is not endemic to the judiciary alone (though it may be more nocent to the judiciary than other institutions). Is the answer to the public crisis of confidence in its physicians (and the resultant prevalence of medical malpractice lawsuits, exorbitant insurance costs, and the other problems afflicting modern medical care) to "educate" people about what doctors do, or about the basics of molecular genetics or neuropathology, or, even less plausibly, about the sundry and intricate possibilities attending the various proposals for a viable American health care system? Surely not. Such an educational program is both impracticable and of questionable desirability.[210] The public, after all, has many other valuable pursuits to occupy its time (earning a living, consuming goods (thereby contributing to the health of the economy), raising and educating children, enjoying well-earned leisure time, and so on).[211] The type of public education that would truly make a difference (i.e., that would meaningfully inform the non-physician public about medicine and keep it sufficiently knowledgeable and in step with the rapidly changing face

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> among equals. . . . Not simply a form of politics, democracy, on the deliberative view, is a framework of social and institutional conditions that facilitates free discussion among equal citizens—by providing favorable conditions for participation, association, and expression—and ties the authorization to exercise public power (and the exercise itself) to such discussion—by establishing a framework ensuring the responsiveness and accountability of political power to it . . . .

*Id.* at 21; RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY, ch. 4 (2003). Judge Posner identifies and examines two democratic models: "Concept I Democracy"—the deliberative model set forth by Professor Cohen and "Concept II Democracy"—the model he favors and believes best describes American democracy today—which is characterized by a more realistic and pragmatically oriented view of public self-interest and the elitism of elected officials in the democratic process. *Id.* at 130, 143–145, 154.

Interesting as these arguments are for the place of communal deliberation and public criticism in the strengthening (or weakening) of the judiciary, *see, e.g.*, JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT, ch. 3 (2001) (describing the inherent tension between judicial review and the deliberative model), their examination must await a future article.

210. It also "hopelessly exaggerates the moral and intellectual capacities . . . not only of the average person but also of the average official (including judge) and even of the political theorists who seek to tutor the people and the officials." POSNER, *supra* note 209, at 144. Furthermore, it underestimates the complexity of the subject matter. In order to achieve anything approaching a comprehensive understanding of the social concerns attending any of the fields listed, enormous and sustained study is necessary.

211. *See* Richard Posner, *Smooth Sailing: Democracy Doesn't Need Deliberation Day. If Spending a Day Talking About the Issues Were a Worthwhile Activity, You Wouldn't Have to Pay Voters to Do It*, LEGAL AFF., Jan.–Feb. 2004, at 41 ("I am unclear about what collective deliberation would add to our political system, but I am pretty clear about what it would subtract. It would subtract from the time that people have for their other pursuits—personal, familial, and commercial.").

of medicine) is entirely inconsistent with "career imperatives and other tugs of self-interest."[212] These are the modern realities of constant time pressures, limited attention spans, economic necessities, and a (perhaps justifiable) lack of interest in matters abstruse and dull. The same can be said of other institutions. Is the solution to the public's lack of faith in its elected representatives more civics lessons, political theory classes, or disquisitions on the internecine workings of government? Not only are such solutions wholly unworkable, but they also ask far too much of a public that is often indifferent to these issues and fully occupied in its own pursuits. It is rational choice—not lack of educational opportunity—that keeps the public relatively uninformed.[213]

Others trumpet that "more speech" is always better; by this, it is meant that a continuation and/or increase in the quantity of judicial criticism is the best solution.[214] In a similar vein, some call for the wholesale relaxation of restraints on judicial speech, thereby permitting and encouraging judges to participate freely in the explosion of critical dialogue.[215] There is undeniable intrinsic value

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212. POSNER, *supra* note 209, at 140.

213. *See* Somin, *supra* note 182, at 1325 ("So long as becoming an informed voter is the only reason for acquiring political knowledge, most ordinary citizens will remain rationally ignorant."); *see also* POSNER, *supra* note 209, at 152 ("With so little at stake for the individual voter, who cannot expect actually to swing the election by his vote . . . he is prey to all those cognitive quirks that psychologists are busy documenting in their experimental subjects. There is not enough at stake for him to make the effort required to resist taking the path of least resistance, the path of lazy thought."). It is therefore rational choice, and the reality that most people simply don't care to know (and will not benefit from knowing) the names and functions of the hundreds of, say, administrative agencies within the Executive branch, that perpetuates public ignorance.

214. *See* Bogus, *supra* note 172, at 397. Bogus is certainly in good company in this belief. *See, e.g.*, Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (using the marketplace of ideas metaphor that has become the cornerstone of freedom of speech doctrine); Bridges v. California, 314 U.S. 252, 289 (1941) (Frankfurter, J., dissenting) ("Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. . . . [J]udges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt."); Monroe H. Freedman, *The Threat to Judicial Independence By Criticism of Judges—A Proposed Solution to the Real Problem*, 25 HOFSTRA L. REV. 729, 729 (1997) ("The problem is not that too many lawyers are publicly criticizing judges. Unfortunately, too few lawyers are willing to do so . . . ."); Howard M. Wasserman, *Symbolic Counter-Speech*, 12 WM. & MARY BILL RTS. J. 367, 385 (2004) ("[F]ree speech demands that the greatest amount of information, thoughts, ideas, and opinions be disseminated from the greatest number of sources. . . . Speech is valuable because it informs people and persuades them . . . .").

215. *See, e.g.*, Hon. Stephen J. Fortunato, Jr., *On a Judge's Duty to Speak Extrajudicially: Rethinking the Strategy of Silence*, 12 GEO. J. LEGAL ETHICS 679, 681 (1999) (arguing that judges should respond aggressively and publicly to "baseless attacks on their integrity"); Hon. Joseph W. Bellacosa, *Judging Cases v. Courting Public Opinion*, 65 FORDHAM L. REV. 2381, 2382, 2385 (1997) (observing that "[c]ommentators' views enjoy the luxurious freedom to be casually, even carelessly quick, while those of jurists must be studiously deliberative," and therefore concluding that "[o]n balance, the stakes are too high and the turf too valuable for judges to sit by silently and complacently cede the discussion field to a few populists with challengeable methodologies or debatable agendas").

in discussion and the exchange of views in arriving at practical solutions to local problems of limited scope.[216] In this case, however, more criticism, whether from the mouths of judges, lawyers, the media, or the general public, is no salve. It is a "highly exaggerated faith" that believes speech, in whatever form and to whatever degree, is either harmless or always desirable.[217] Just the reverse is true. The enormous increase in speech (through, for example, the medium of Internet web sites, blogs, and chat rooms) has only served to balkanize and polarize positions, as individuals can easily access viewpoints that move them toward "extreme points in line with their initial tendencies."[218] More criticism will beget more hostility toward and from the judiciary (as judges become more eager and able to speak publicly and uninhibitedly), as well as less respect for the institution—that, plainly, is the lesson to be drawn from our present state.[219] Already the irritant of overabundant criticism has only exacerbated the chafed relationships between governmental branches, as well as between the judiciary and the public; it has also produced greater opportunities for political manipulation by the legislature in the form of threats of removal. Is it reasonable to believe that *greater* quantities of criticism would produce the opposite result? Neither of these answers—greater education or more speech—presents a workable or likely solution to the problem of the intense friction between the legislative and judicial branches.

## IV. CONCLUSION

I have no feasible prescription for the ailment I have described. It is too late in the day—some sixty years after *Bridges*, and with the

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216. *See* POSNER, *supra* note 209, at 137.

217. *See* White, *supra* note 180, at 815.

218. L. A. Powe, Jr., *Disease and Cure?; Republic.Com by Cass Sunstein*, 101 MICH. L. REV. 1947, 1952 (2003) (book review). Professor Powe continues:

> Sunstein's remedy is wonderfully Brandeisian: more speech, speech rebutting speech. But the concept of group polarization is premised on the fact that counterspeech is not accessed or else doesn't get through. The Internet may make acquisition of alternative information easier, but this doesn't guarantee that the information will be accessed even if there is an offered link on the page.

*Id.* at 1952–53.

219. Canon 3B(9) of the Model Code of Judicial Conduct contemplates, at least with respect to pending matters, the necessity of keeping judges out of the fray of just such intercourse: "A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing." MODEL CODE OF JUDICIAL CONDUCT, Canon 3B(9) (1990). One of the reasons for prohibiting judicial speech lies in the corrosive effect of such speech to the judiciary's perceived legitimacy.

freedom of speech basking in the fullness of its strength as one of the holiest of constitutional holies[220]—to argue that limiting or stifling criticism of the judiciary is the answer.[221] We arrive, then, at an impasse. More judicial criticism (that is, an intensification of the status quo) will not improve judicial-legislative relations; an imposed system of prior restraints against judicial criticism would be both politically (let alone constitutionally) intolerable in the present climate and would do little to shore up the perceived legitimacy of the courts; and any meaningful public education is impracticable and possibly undesirable. The conclusion must be that further deterioration of the relationship between the legislative and judicial branches is inevitable—sacrificed at the altar of the First Amendment and the public worship of limitless critical exchange. Congressional threats of removal against federal judges, merely the legislator's opportunistic exploitation of the culture of criticism, will play an increasingly prominent role in that breakdown.

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220. LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 7 (1986) (observing that the concept of free speech is one of our "foremost cultural symbols"); Professor White offers the following convincing account of the common, horrified reaction to any proposal remotely suggesting that some speech may not be worthwhile:

> Let me begin by asking you first to reflect on your own response to what I have just said about certain strains of speech in our culture of which I disapprove . . . . If you are like me, a side of you will have reacted very strongly, something like this: "Who are you to use the word junk of any speech? As Americans we are committed to our liberties, to our liberty of speech above all. The explosion of speech in our public spaces is an inherently good thing, not a bad one, even if you don't like it. What kind of elitist are you anyway?"
>
> Some such response . . . is I think deeply built into our minds and our culture. It is an instinctive reaction so well established among us as to be a kind of second nature. At the faintest signs of what looks like censorship or even disapproval of any form of speech we are likely to find ourselves resisting strongly. We boldly say that we are cheerfully willing to pay the price of too much speech—and of trivial or even dangerous speech—and for several very good reasons: in order to avoid the evil of government censorship; in order to make truly democratic politics possible; and in order to respect the right of the individual to form her mind, and her relations with others, in such manner as seems to her best. . . . This is a key part of what it means to be an American.
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> . . . .
>
> . . . This is the position we instinctively resort to when someone challenges the idea that speech should be free.

White, *supra* note 180, at 811–12.

221. Justice Brandeis's admonition that "enforced silence" is not a viable option except in the most dire of circumstances has reached legendary stature. *See* Whitney v. California, 274 U.S. 357, 377 (1927).