The Federalist Society for Law and Public Policy

presents

JUDICIAL INDEPENDENCE

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PANELISTS:

Hon. Carlos T. Bea, United States Court of Appeals, Ninth Circuit

Hon. Danny J. Boggs, United States Court of Appeals, Sixth Circuit

Hon. Timothy B. Dyk, United States Court of Appeals, Federal Circuit

Hon. Patricia M. Wald, United States Court of Appeals, District of Columbia Circuit (retired)

Hon. Dennis Jacobs, United States Court of Appeals, Second Circuit (moderator)

MR. REUTER: Welcome to our National Lawyers Convention Luncheon. It's my great pleasure to welcome you here today. You, that esteemed group described by the *Washington Post*—and I want to get this right—as the "pinstriped tribe of conservative legal minds called the Federalist Society."[1] Now why is it every time I quote the *Washington Post*, you laugh?

Anyhow, it is my great pleasure to introduce this panel and its moderator. Internally at the Federalist Society, we have been referring to this as the "bunch of judges" panel. Of course we refer to them only very respect-

1 David Montgomery, *No Secrets Here: Federalist Society Plots in the Open*, WASH. POST, Nov. 18, 2006, at C01.

fully as "a bunch of judges."

Now, many of you probably know that we have conference calls in advance of these panels to get everything right and discuss the logistics. And sometimes disagreements can arise. But I am happy to report that when I had the call for this panel, there were no disagreements about the order of the speakers or anything that anyone would propose to say. In fact, the only points of disagreement were how many gavels should be provided and how many federal marshals would be on hand. I am now beginning to hope that this has not become the "contempt of court" introduction.

Anyhow, what better topic to discuss here today at our luncheon than judicial independence, after the recent *Wall Street Journal* exchange between U.S. Supreme Court Justice Sandra Day O'Connor and Circuit Court Judge Bill Pryor?[2] And what better group of panelists could we have assembled to speak about the issue than federal appellate court judges, current and former? These are people that live, eat, drink, and sleep judicial independence on a daily basis. In fact, here at the Convention we have some twenty federal appellate court judges participating, many in today's audience. When you stop and think about it, twenty judges is a fair percentage of our entire active federal appellate bench that we have presented at this year's convention. And of course, the other night at dinner we were just a couple votes shy of being able to grant *cert*.

It really is remarkable when I reflect on the personalities and organizations that are represented by the participants in our convention: twenty federal appellate court judges, two Supreme Court Justices, state judges, and law school professors from the very best law schools in the country—Yale, Harvard, Chicago, Georgetown, Berkeley, Duke, Colombia, Northwestern, Pepperdine, and Texas—three law school deans and public policy officials, a sitting governor and three state AGs, a couple of former U.S. attorneys general, the current and two former U.S. solicitors general, and of course the Vice President. Roaming the halls and on stages, we have also seen quite a few U.S. senators, congressmen, and former congressmen, several Cabinet secretaries, the Head of Domestic Policy, journalists and commentators, and importantly representatives from Human Rights Watch, the ACLU, the Center for American Progress, People for the American Way, and the ABA. These last few are very welcome to join us here in our discussions, and they really do help underscore the spirit of debate that is so integral to the Society.

The moderator for our next panel is truly a remarkable, likable man. Judge Dennis Jacobs is the Chief Judge of the Court of Appeals for the Second Circuit. He has been a judge on that circuit since 1992, leaving a

2 *See, e.g.*, Sandra Day O'Connor, *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A18; William H. Pryor Jr., *Neither Force Nor Will, But Merely Judgment*, WALL ST. J., Oct. 8, 2006, at A14.

partnership in a major private firm to assume his position on the bench. He is a regular participant in Federalist Society events. I have never seen him perturbed or with anything but a big smile on his face and a ring of laughter nearly always in his voice. Given that demeanor, I am keenly interested to learn just how deep his concerns about judicial independence could possibly run. We are very pleased to have him with us here today.

Please join me in welcoming Judge Jacobs.

JUDGE JACOBS: The first thing I want to say is what a privilege it was for me to be here in the room last night listening to the Vice President. For me, that was sort of a lucky accident. I just saw a very long, snaking line outside, and I got on the end of it, and when I got to the front I thought that I was going to be able to buy a PlayStation. But the event was much more rewarding than even that.

As a moderator of a panel on judicial independence, I suppose I should talk up the importance of this topic and justify the time that we will spend exploring it. This discussion will be provocative and absorbing. The subject is important. But the threshold question for me is, really, whether judicial independence is a great issue in terms of the size of the threat to judges? Is judicial independence so precarious nowadays that it is a legitimate preoccupation? And if it is secure, what fuels this issue as a major controversy?

One essential preliminary to the discussion: this topic will be discussed chiefly, though not altogether, in the context of federal judges. The subject sprawls when it is expanded so that each of the states is in play, and the panelists and your moderator have all been on the federal side, so we will focus on what we know. As to independence, I suppose I should ask if I should be worried. Under Article III, I enjoy enormous insulation from reprisal. My salary is secure, and if I am impeached, I will not make less than I do now. I hold a position of distinction and moderate power, recently diminished by my becoming Chief Judge. And if I am so inclined, I can arrange to be lionized.

Federal judges who focus on criticism or threats of impeachment may be susceptible to being characterized, possibly mischaracterized, as a bit overwrought. On the other hand, there are assaults on judicial independence that need to be decried. But when one talks about independence, it is important to ask, independence from what? From Congress? The Executive? From critics? From humiliation? From gross disrespect? From threats of impeachment? From imputations of partisanship? And, independence to do what? Presumably, our jobs.

Finally, as we talk about the subject, we should not forget that the empowerment of judges is at the same time an empowerment of the legal profession and the legal community. The bar has its own interests, and it

would be naïve to think that the bar is the only major player in our economy that is not self-interested and working to expand its influence. So, when the bar rears up to defend judicial independence, often for judges who exercise or overextend their sweeping powers, we cannot know who is moved to defend judges out of neutral sense of public interest, who is making room for doctrines that they approve and that judges promote, and who in that group is aggrandizing the power of the legal profession generally to operate and promote its agenda without the kind of bare-knuckled criticism that prevails everywhere else in our culture.

To discuss these subjects and many others, we have, as Dean has pointed out, a very distinguished panel. We are going to hear very briefly from each of the four speakers, so that you can get acquainted with their views, and then I will pose a bunch of questions.

Our first speaker is Danny Boggs of the Sixth Circuit Court of Appeals. He is a Kentuckian who attended Harvard and the University of Chicago Law School. He returned to Kentucky after school and was legal counsel to the governor, among a number of other distinguished positions in state government. He came to Washington and was assistant to the Solicitor General of the United States, and other jobs. And then, after an interlude in private practice, he returned to serve in the White House Office of Policy Development and Special Assistant to the President. In 1986 he was appointed to the Sixth Circuit. In 2003 he became Chief Judge.

Patricia Wald was educated in my circuit with a law degree from Yale and a clerkship on the Second Circuit. She has had a varied career and practiced in the Justice Department, in the Neighborhood Legal Services, and in the Center for Law and Social Policy. She was appointed to the D.C. Circuit in 1979, became Chief Judge of that court in 1986, retired in 1991, and since then has been intensely active in the American Law Institute, and, very recently, as a judge of the International Criminal Tribunal for the former Yugoslavia.

Carlos Bea grew up in Los Angeles. He has a BA and a law degree from Stanford. He worked in a firm in San Francisco, had his own firm for 15 years, until the Governor appointed him to the San Francisco Superior Court. In 2003, he was appointed to the Court of Appeals for the Ninth Circuit, where he now serves.

Timothy Dyk is a circuit judge on the Federal Circuit. He took office in 2000. A graduate of Harvard Law school, he was a law clerk to Justice Reed, Justice Burton, and Chief Justice Warren. He served as special assistant to Assistant Attorney General Louis Oberdorfer in 1963 to 1964. I am happy to say that I sat with Judge Oberdorfer on my court this past Tuesday. And Judge Dyk has been adjunct professor at a number of distinguished law schools.

We will begin with Judge Boggs.

JUDGE BOGGS: Thank you, Judge Jacobs. I have been asked to give my views on judicial independence very briefly, so I will rattle through this. First, I think that there are two aspects of judicial independence, inner and outer. Inner is what we do as judges. Outer is what people may do, or may try to do, to us.

Discussions of judicial independence largely and most frequently focus on the second, but I think the first is really the more important to start with. One of the things I did in my checkered career was to go to Moscow on several occasions and teach Russian judges. Especially in the early days, when the USSR was still in existence, they spoke about "telephone justice," meaning the party boss would call judges up and tell them how to rule. We heard a great deal about this. Finally, a very cynical defense attorney who had managed to stay active under the Communists said, "Listen, these guys are talking about telephone justice. That is only for the stupid ones; the smart ones don't need to be called." I take from that that, whether carrots or sticks are being used, if you internally think that you know how this case is *supposed* to come out, then you are not independent.

To take another example, Professor Mark Tushnet, a man of great stature in the academy, had a law review article a number of years ago, explaining how he would act as a judge.[3] He said, "Well, I would decide what decision in this case is most likely to advance the cause of socialism, and having decided that, I would then write an opinion in the grand style."[4] Now to me, that is not judicial independence. No one has a gun to his head, but he is not getting his ruling from impartial principles; rather, from an overarching appeal to personalities or principles other than those of the law. So, to me, the internal is most important.

With regards to the outer part—what can be done to us? Well, we have seen what has happened in other countries. Blessedly, we have been almost, but not entirely, free of force. There was a group we had in our court once litigating under the title of "By Any Means Necessary." If they had actually meant it, that would have been a threat to judicial independence.

Then, there is money and compensation. Hamilton obviously focused a great deal on those two. Rampant and uncompensated for inflation at some point could become a threat to judicial independence. I do not think that it has yet, but it could. And the third is obviously the threat of dismissal in some way. Frankly, that threat in the past has been so weak that I do not think any of us are intimidated by it—although, as my wife continues to tell me, "Your tenure, Love, is not for life; it's during good behavior."

3 *See* Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411 (1981).
4 *Id*. at 424.

Now, there are many other things said and done about judges that may be bad ideas—but bad public policy ideas that are not threats to independence. Nor is criticism a threat. I take my text from Churchill, who at one point said that, "I do not resent criticism, even when occasionally, for the sake of emphasis, it parts company with reality."[5] I think that is what judges have to do. The phrase "independence" may be a little off-putting to people. In my part of the country, if you say, "Zeke, he's real independent," that does not mean he is impartial. It means he is willful and headstrong. That is not what independence is about. Independence is not an end in itself. It is a means to impartial adjudication.

Hamilton, in a part of *Federalist* 78 not frequently quoted, says, "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents."[6] I take from that that we are not independent to exercise an arbitrary discretion. We are independent to be impartial arbiters.

Dennis asked me to be provocative. I will just throw out one more thing. I will put it on the table as heretical. We say that judges should never be impeached for their decisions, and obviously in the ordinary run of things that is true. But let me just ask the question at least. A judge who behaved as Judge Tushnet would have, or a judge who avowedly always ruled for the litigant with a lighter skin, or a judge who would permit an execution for treason on the testimony of one witness in the face of the clear constitutional command that there must be two witnesses; would that be worthy of impeachment? I do not think that we have any judges that go that far, but I think sometimes it is well to posit the outer limit case to show why simply wrong decisions are not actionable by positing the heretical notion that it is possible that there could be decisions that would be impeachable.

Thank you.

JUDGE WALD: When I first got this invitation, I felt a little bit like Eleanor Clift on the *McLaughlin Group*. But I see it is not that way. On the contrary, I am surrounded by former colleagues.

I feel that the threat of lack of independence is not, quite frankly, on the individual level. The Founding Fathers gave us life tenure on good behavior and no diminishment of salary. Like Judge Boggs, I have been abroad, and it is not just telephone justice in a lot of countries. In Bulgaria, they shut off all the electricity in the court building when they do not like the decision. There are variations on this theme from which we have also thankfully not suffered in the States. But I think it is interesting to look at

5 MARTIN GILBERT, THE CHURCHILL WAR PAPERS 120 (1941).

6 THE FEDERALIST NO. 78, at 529 (Alexander Hamilton) (J. Cooke ed. 1961)

this issue historically because, actually, as Alexander Hamilton recognized in the more familiar part of the *Federalist*, the Judiciary is probably "the least dangerous" branch in terms of its power.[7] It has not the power of the purse, nor of the police. In the very beginning of our country Congress made a few attempts at perhaps unwise impeachments, but that died out. It has been a long time since there has been any serious threat of impeachment.

Article I says that Congress defines the inferior tribunals[8] and, I think, under Article III can make the regulations and exceptions to appellate jurisdiction of the Supreme Court.[9] Those are big powers. I think it is Professor Geyh in Indiana who has written a book recounting historically how there has come to be a kind of mutual restraint—which I hope can continue—between Congress and the courts.[10] In other words, there is a tacit understanding that they simply are not going to use those kinds of powers, even when they get mad at the courts for particular things they have done.

I do think some of the *ad hominem* attacks on judges have gotten particularly nasty in the last several years, but that may be a mark of the general polarization of parties and the political debate we have had. Judges have taken some of the brunt. It is something that I think we ought to keep our eyes on. We should try to keep the discourse civil. It is fine to criticize judges for their reasoning or for their decisions when there is disagreement. But when criticism turns particularly nasty and derogates into name calling, it is just possible, as Professor Geyh pointed out in his book, that if enough mud is slung around, some of it might actually stick. So, I think it behooves us all, whatever side of the issues we are on, to try to keep the discourse civil.

I do agree with Judge Boggs; internal independence is terribly important among judges. The Constitution makes the appointment of judges inevitably somewhat of a political process—nominated by the Executive, confirmed by the Senate—all sorts of people get in there and put their two cents in for their own particular reasons. But once the judge is on the court, he really has to be very careful, very conscientious—I think most are—in looking inward as to whether, when a decision comes up, he is at all worried about its effect upon the people who appointed him or the people whom he tends to ideologically align with. Decisions ought to be something that comes out of looking at the law, such as it is, or consequences of the law as best one can account for them.

There is some very interesting research which shows that the independence of the judge may be not so much a concern about the political rami-

7 *Id*.

8 U.S. CONST. art. III, § 1.

9 U.S. CONST. art. III, § 2.

10 Charles G. Geyh, WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM (Univ. of Mich. Press 2006)

fications upon the judge's original party of appointment as peer pressure. There is a growing amount of it demonstrating that if three judges from a like background sit together, they are very much more apt to render a decision which is very strong in terms of a particular viewpoint. If you have one judge from another point of view, it is apt to break that up. Even if they come out with the same basic majority decision, it is apt to be in different terms. It is not apt to be as strong. It is apt to reflect more difference of opinion. Here again, that may have some implications for the kind of prolonged periods in which, in some courts, the same judges sit for a very long time.

The last point I want to make is that there is a difference between independence—admittedly an ambiguous term—of individual judges and independence of the Judiciary as an institution. Some of the considerations are different. Of course, under Article I, Congress has the right to create these inferior tribunals and to define their jurisdiction.[11] But from what we can tell from the debate at the time, the notion was that the federal courts would serve as kind of an umpire to make sure that the other two branches did not overstep their particular bounds.

Perhaps we have different opinions on this matter, but at least some of us are concerned when both the Executive and Congress seek to take from the courts, powers they have had traditionally which affect the rights of individuals. I know this is a controversial subject, but the recent examples I am thinking of are the removal of *habeas corpus*[12]—I think that is the word in the Military Tribunal Act—and any other type of proceeding in which certain things could be issued in favor of the format that laid it down. We also have other doctrines, some of them imposed by the courts themselves, like state secrets, which obviously we need to a degree, but have been interpreted to in effect, remove judicial review in some cases—such as the wiretapping surveillance program. That decision has gone the other way but some other decisions have not, so that the courts have in effect lost their role entirely. That is something I think we judges and others should keep their eye on, to make sure that the courts do not get marginalized or stripped of what I think is their true role in the constitutional structure.

JUDGE BEA: I was very glad to hear Judge Wald say that we are not here to defend particular attacks on judges, being from the Ninth Circuit, as I am. The term in the discussion is judicial independence, and I propose we step back and take a look at it from two different angles. The one we have been talking about up to now is the independence of the Judiciary from outside pressure.

But the electorate has been telling us, I think, over the last few years

11 U.S. CONST. art. III, § 1.

12 The Military Commissions Act of 2006, Pub. L. No. 109-366, § 949, 120 Stat. 2600 (2006).

that there is another type of judicial independence they are interested in, which is perhaps independence *from* the Judiciary in certain matters, such as same-sex marriage. Overreaching courts have spawned this criticism, and, as we know from the recent exchanges in the *Wall Street Journal*, Justice O'Connor has taken the view that this poses a grave threat to judicial independence.[13]

She has cited three sources[14] which I would like to discuss briefly. One is the state ballot measures, the most unusual of which was Jail for Judges, which would have stripped immunity not only of judges but of jurors in grand jury proceedings in South Dakota. That went down to a ninety-to-ten defeat,[15] showing the good sense of the people of South Dakota. The next one was the Colorado initiative, which limited judges' terms and applied the limitation retroactively, which also went down in defeat.[16] The third was what I thought was a rather modest proposal in Oregon to have appellate court judges have districts for elections, on retention elections. This is not a revolutionary idea to us in California, since we have had that since 1905, but that also went down to defeat.[17] So, it does not look like the ballot is going to be a big threat to independence of the Judiciary, at least this year. Congressional action also has not been particularly successful. The Inspector General bill of Congressman Sensenbrenner was not acted on. Also, the Pledge of Allegiance jurisdiction stripping was not acted on.

So, what it really boils down to, I think, is that Justice O'Connor is a bit touchy about public criticism of the Court's decisions. And she has picked up an ally, Nan Aron, president of the Alliance for Justice, which I am not sure was expected, who writes in the *Wall Street Journal* letter column a few days ago: "Judicial independence is under attack not because judges are busy creating the right. Rather, it is under attack because the Right's messaging machine espouses facile rhetoric so often that activists are now responding with the overreaching measures which Justice O'Connor correctly decries."[18]

So, what grave threat is left? The Alabama jurists who took that strong position on placement of the Ten Commandments in the courthouse have not even survived the Republican primary and are no longer in office. Personal threats, well, I do not want to minimize what happened in Chicago a few years ago,[19] but we do not seem to have the personal threats we did in

13 O'Connor, *supra* note 2.

14 *Id*. (referring to judicial accountability initiative measures, Colorado's Amendment 40, and Oregon's term limit for judges).

15 *Capitol Insider*, the Oregon State Bar Public Affairs Newsletter (Nov. 14, 2006).

16 *Id*.

17 *Id*.

18 Nan Aron, *Letter to the Editor*, WALL ST. J., Nov. 16 2006, at A17.

19 Jodi Wilgoren, *Haunted by Threats, U.S. Judge Finds New Horror*, N.Y. TIMES, Mar. 2, 2005 (describing the murder of a federal judge's husband and mother, presumably in connection with a ruling

the days of desegregation and the kind of person who really intends to do us ill will act this way: there was an item in the *Fort Worth Star-Telegram* recently about a lady who had sent some home-baked cookies with rat poison to the members of the Supreme Court and the chiefs of staff of the Army, Navy, and Air Force, with a letter saying, "This is meant to kill you, this is poison," tacked on top of it.[20] I do not know whether she benefits or not under the sentencing guidelines that allow downwards departures for early acknowledgment of responsibility, but she got fifteen years.

Now, the jurisdiction stripping question is front and center. First of all, I would note that this really is not something new. Jurisdiction stripping has been around since about 1820, when some people tried to get rid of Section 25 of the Federal Judiciary Act of 1789.[21] That went through certain mutations in the Reconstruction Era. It was not always a conservative construct. Remember the Norris LaGuardia Act which stripped the federal courts of injunction power in labor disputes and in Yellow Dog contracts?[22] We have a series of jurisdictional stripping statutes of recent vintage which are not all that controversial in the Antiterrorism and Effective Death Penalty Act of 1996. One deals with second and successive *habeas* petitions. The Immigration Act has one regarding removal orders for prior convicts.

The one that Judge Wald indicates is going to be the subject of some discussion: whether limitations of review of *habeas corpus* is a suspension or not under Article I, Section 9.

But I am going to talk a little bit about what I consider to be a real threat to judicial independence, which does not have to do with the federal judiciary; it has to do with State-contested elections. First, a disclaimer: I was appointed a judge, and within eight days was told by the county clerk that I was in a contested election. I did not have much time to do anything bad or good, but I knew I was in an election. And I was sitting in the City and County of San Francisco, appointed by a Republican governor, registered Republican, a Catholic, white and married—and it was not a same-sex marriage. So my election was less an election than a miracle. I won 59-41.

But there are two types of elections. The retention election is used throughout the country, and it says yes or no as to a sitting judge on an appellate court. I do not have anything particularly bad to say about that. It is very rare that one has to spend a lot of money defending a retention election. They are usually not successful, although they were in California in getting out three Supreme Court Justices in 1986. I think that is a valid ex-

made against a white supremacy group).

20 Linda Greenhouse, *Justice Recalls Treats Laced With Poison*, N.Y. TIMES, Nov. 17, 2006.

21 *See*, *e.g.*, JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT AND A DISCOURSE ON THE CONSTITUTION OF THE UNITED STATES (Richard K. Cralle, ed., 2001).

22 29 U.S.C. § 103 (2006).

ercise of democratic consensus, whereas the contested elections where one or more candidates run for trial or appellate seats have gotten totally out of hand. My election cost me $100,000, and that is peanuts these days. The average price of a judicial office, according to a study by an organization which always draws a laugh here, the ABA, is about $431,000.[23]

These increases have two effects. One, the judge who gets the money to run the election gets it mostly from attorneys, and sees those attorneys the next day in court. Second, I have observed judges looking over their shoulder before making decisions because of an upcoming election. It has happened in San Francisco with some frequency. And then there is what I call the bureaucratic and administrative nuisance. It is a subtle limitation on independence. To give you an example, take the recent Advisory Opinion No. 67 of the Judicial Council,[24] which requires judges to make disclosures as to which seminars they go to. You must make disclosures, for instance, when you go to FREE. That is the Foundation for Research on Economic and Environmental Issues in Montana. And you must make one if you go to a George Mason seminar. But you do not have to make one if you go to the seminar by the judicial division of the ABA. That distinction supposes that FREE and George Mason are tainted by ideology, while the ABA is not.

Overall, I think that the grave threat that Justice O'Connor was talking about does not exist, at least not at the level of the threat to independence which exists at the state level because of contested elections.

JUDGE DYK: Thank you. I agree that the problem at the state level is a significant one. I am going to confine my remarks, however, to federal independence and look at this a little bit historically. It is a lot easier to address this subject historically since the passions have cooled, though addressing it in the present is obviously important also.

It strikes me that there are two kinds of threat to judicial independence. One is the kind of threat that results in a case or controversy. In that category the Judiciary has the keys to its own prison. It is able to adjudicate whether the threat to its independence is consistent with the Constitution, with the Compensation Clause, with the Life Tenure Clause, or with Article III itself. Perhaps with some exception, most people seem to agree that the Judiciary can be the final word on those issues. We have court cases considering issues of judicial compensation,[25] of jurisdiction strip-

23 *Report of the American Bar Association Commission on the 21st Century Judiciary*, 29, *available at* http://www.soros.org/initiatives/justice/articles_publications/publications/jeopardy_20030613/justiceinjeopardy.pdf.

24 Committee on Codes of Conduct, Advisory Opinion No. 67, *Attendance at Educational Seminars*, *available at* http://www.uscourts.gov/guide/vol2/67.html.

25 *See, e.g.*, United States v. Will, 449 U.S. 200, 230 (1980) (finding unconstitutional Congress's

ping,[26] and of the elimination of judgeships, as happened in the 1802 Judiciary Act, as well as cases involving congressional efforts to change the result in particular cases that have been adjudicated by the courts to confer inappropriate duties on the judiciary, such as advisory opinions. In these areas, the cases come to the courts; the courts can resolve them. And the Supreme Court is accepted by most people to be the ultimate arbiter of the question.

I do not see those issues as presenting quite the same threat to the Judiciary as the kinds of issues that cannot come before the Judiciary—those with regard to which we have to rely on the good will of the Executive, Congress, and the support of the Bar and the public. The quintessential example of this, of course, is the FDR court-packing plan. Adding Justices to the Supreme Court is not something that results, I would assume, in a case or controversy that can be adjudicated by the courts. The courts had to rely on the U.S. Senate to support it and prevent the court-packing plan from being enacted.

Another example would be the refusal of the executive branch to enforce judicial decisions. There is not much the judges can do about that, and there are historical examples—of course, President Jackson's famous remark about *Worcester v. Georgia* that, "Chief Justice Marshall has made his decision; now let him enforce it."[27] There are modern examples too. In the Eisenhower administration there were decrees in desegregation cases that the Administration simply did not do anything about in the *University of Alabama* or one or two other instances; ultimately forced by public opinion, as in the paratrooper intervention in Little Rock.[28] That is a matter of some concern.

Restricting the resources of the Judiciary would be a matter of serious concern that the Judiciary itself cannot deal with, or refusing to provide physical security for judges, which we see as an issue in foreign jurisdictions occasionally. Those are things that the Judiciary itself cannot do anything about. The questioning at confirmation hearings of judges, where there are efforts to get judges to promise to rule in particular ways in future decision-making—there is not much other than refusing to answer the question that the judges can do in the course of those hearings.

So, there are hundreds of pages of Hart and Weschler that can come before the Judiciary where the thrust to judicial independence can be resolved by the Judiciary itself, but the more serious problems are the in-

attempt to alter judicial salaries).

26 *See, e.g.*, Calcano-Martinez v. INS, 533 U.S. 348 (2001) (deciding to retain jurisdiction over alien habeas claims despite congressional attempt to strip jurisdiction by statute).

27 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 219 (Little, Brown, & Co., 1923).

28 MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION* AND THE CIVIL RIGHTS MOVEMENT 91–92 (2007).

stances in which the Judiciary cannot do anything to protect itself and has to rely on other parts of the government and the bar and the public to protect it.

JUDGE JACOBS: I just would like to pose a few questions to the panel, most of which kind of bounce off comments that were already made. As Judge Wald has pointed out, the Military Commissions Bill, signed into law last month, strips us of jurisdiction to hear a petition for a writ of *habeas corpus* filed by any alien enemy combatant anywhere in the world. My question is what interest do judges have in the scope of our own jurisdiction? Is it a problem of judicial independence or is it just a matter of separation of powers?

Anyone?

JUDGE BOGGS: Well, the way you put it I guess harkens back to my quote that there may be things that are bad policy, but they are not necessarily threats to the independence of judges. I think there is an interesting distinction or concomitance between individual judges, which is what I was mostly talking about, and the judiciary, which is what Judge Wald talked about. I would not see something like that case that you just mentioned as being any threat to my independence, which is how I handle my cases. But of course, it also brings into play Judge Dyk's point that the judiciary is the guardian of itself in the sense that if the law is declared unconstitutional, the litigation itself protects us.

JUDGE BEA: Well, on this question of jurisdiction stripping and taking away the right of *habeas corpus*, we had a situation since 2005 in the Real ID Bill,[29] which has taken away *habeas* from immigrants and said that the only judicial review that they get is a petition for review following the BIA. I have not seen any constitutional attacks on that.

For those of you who are doing this kind of work, the scope of review, the amount of evidence, the judicial determination under *habeas* is quite different from a petition for review from the Board of Immigration Appeals, the latter being, I think, more restrictive than the former. So the issue of whether stripping *habeas* from aliens is any worse than stripping a *habeas* from illegal combatant detainees is something which will probably come up.

I am sort of amused by the fact that no one has brought up the unconstitutionality of the Real ID Act that I know of, but everybody is talking about the unconstitutionality of denying that same right to illegal comba-

29 *See* REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005).

tant detainees. They have different constituency.

JUDGE WALD: Well, I think, as someone said initially, maybe our terminology is not perfect. When we are talking about independence, obviously we are talking about sometimes different things. But I do think that Article III, which defined the judicial power—implicit in that, and even for the originalists in most of the discussions that went around at the time the Constitution was adopted, was the notion that the courts would do two things as the federal judicial power. One, they would act as a sort of umpire in certain situations between the executive and the legislature to make sure the Constitution itself was honored. And secondly, that with the addition of the Bill of Rights, all the debate became about that later on, that there would also be a protection for that.

The basic constitutional question, you are right, as to who has *habeas corpus*—whether it extends beyond citizens or beyond constitutionally—is one that has not yet been decided. The *Rasul* case[30] said there was a statutory right under the statutory articulation of *habeas corpus*, and that issue may yet have to be decided.

But on your last point, I think there is a very basic question that bothers a lot of people. Certainly, as you know, in Congress it only passed by one or two votes or whatever it was. The chances are, I would guess, it will be revisited again in a later Congress. But the Military Commission Act does not just take *habeas* away from persons who are eligible for deportation or for the aliens in Guantánamo, but for legal residents of the United States who are not citizens.[31] And that does go one step above and beyond anything that has gone before. You could be here for forty years as a legal resident, have raised your children, run your store, whatever, and suddenly find that you were an enemy combatant and had no *habeas corpus* rights. So whether or not technically that comes under the rubric of independence, I do not know. You could have a word fight. But I do think it is an issue that ought to concern the judiciary.

You know, my final remark is we could have our salaries—I mean, I have a nice pension but I no longer have a salary—we could have our salaries to the day we die, and we could be sure that we were not going to be impeached. But if you were sitting there and really had no jurisdiction to decide anything that was important constitutionally, I am not sure whether that is where we want to go.

JUDGE JACOBS: Thank you. One issue that has frequently been

30 Rasul v. Bush, 542 U.S. 466 (2004).

31 *See* The Military Commissions Act of 2006, Pub. L. No. 109-366, § 949, 120 Stat. 2600 (2006).

discussed in the context of judicial independence is the nomination and confirmation process, which has been growing increasingly tough over the last couple of decades. But considering that federal judges get life tenure once that ordeal is over, how can it be said that the process itself has an impact on the judicial independence of anybody who is serving?

Any takers?

JUDGE DYK: Well, do you think that in situations in the Senate hearings, if a judge is asked how he or she would rule in the future on a particular case and is compelled to answer that question, that can overhang future decision-making in a way that does interfere with independents?

JUDGE JACOBS: Assuming one is compelled to answer.

JUDGE DYK: Well, I mean—you could refuse to answer, but then you can also not get confirmed.

JUDGE BOGGS: No, many judges have refused to answer and have generally been confirmed. I suppose the opposite side of it is your independence, as he says, is once you are sworn in, you can simply say "sorry, I lied."

JUDGE BEA: But that did take place on the Senate, right?

JUDGE BOGGS: I mean, in a sense, you know, Lincoln had the right quote here. I think he was talking about—it may have been about Chase, and he said something like, "we must have a man who will be sound on the Greenback Clause, but we cannot ask him because if we did, he could not answer, or if he did, we would despise him for it." And that is sort of the dilemma of the nomination process. And to me, it gets to that question of what is good policy. They cannot shoot you or hit you over the head or cut your salary once you are in office, and the fact that they can read back to you your testimony is not very much of a threat to my independence—although that may have been because I was not asked very many tough questions.

JUDGE WALD: I think that it may not even be such a threat to judicial independence. You get through smoothly and you go on your way. Although, let us assume most judges, the ones that I know, are conscientious. And if they have said something, they tend to try to stay on the same path hereafter, rather than say "bye-bye, I'm on the bench now and I'm on

my own." But I think the importance of the confirmation process—which has defects—is that it gives, or it should give, the people in the Senate, if they used it rightly, if they used it with caution and thought, it gives them a basis for deciding whether or not they want to confirm somebody on the bench. But it also becomes a forum to introduce, with television, the American public to some of the issues.

So just as a point, as we are talking about other countries' experience, it was interesting to me because the European Union now has a kind of tenet. They have norms, but for the area over which they have jurisdiction, one of their norms of the judicial area is that legislatures should have nothing to say about, and should not have any role in, the confirmation of judicial appointments; it ought to be entirely an executive or commission etc. I think that is wrong. I think actually the confirmation process, although it has been misused, does serve an important process apart from whether it affects the independence of the judges.

JUDGE BEA: I would like to just take a moment to shoot one bird down. You hear from time to time that the Senate confirmation process is so harrowing that good people are shooed away or scared of becoming federal judges. I have not noticed that. What I have noticed is a lot of people trying to get their foot in the door and trying very hard to become federal judges.

JUDGE JACOBS: We are going to take questions from the floor in a moment. I am just going to ask one last question of my own.

Lawyers, and the bar in general, have a supposed duty to defend judges who are under attack on the theory that judges are prevented by ethics, and probably prudence, from defending themselves. Is this duty being discharged, in your view, and is this duty being discharged evenhandedly?

Any takers?

JUDGE BOGGS: Well, I think that when judges are attacked on a substantive basis, you have some lawyers who agree and some who do not, just like law reviews. And probably the law reviews are not completely evenhanded either. I think that in the instances that are, in my view, real threats—for example, the South Dakota referendum or something that were to dismiss existing judges, as in Colorado—I think the defenses have been pretty evenhanded. When it comes to criticism, I originally said that was not a threat to independence, so if some of my friends are for me and some of my friends are against me, that is just what happens, just like the law reviews or the editorial page of my local paper.

JUDGE WALD: I think the bar has an obligation to defend, when the criticism is very much ad hominem, et cetera. There was a period in the beginning of women judges, and I remember seeing the article where an executive, a member of the executive department who was mad at a decision said, well, what would you expect of a woman judge? When that kind of thing comes up, yes, I think the bar does have an obligation. And to a fair degree—and I do not read the papers all over the United States, I read the eastern seaboard ones—I think that they have mutually taken up that cudgel. And as you say, obviously if the reasoning is lousy or they think it is lousy, they have every right to say that.

JUDGE DYK: Can I make one more comment? I wonder if in the last ten or twenty years, the bar itself has become less independent than it was as a result of the competition for clients. I think, in terms of the sort of support the judiciary can expect from the bar, I think it was a lot greater forty years ago than it is now, just because the bar itself has lost independence.

JUDGE JACOBS: I will take some questions. A question seeks to elicit information rather than to give it. It usually starts with what, where, or why, and it ends on an uptick like a valley girl.

Yes sir.

AUDIENCE PARTICIPANT: I was interested in what Judge Bea said, and I was interested in the other panel members, in terms of the effect of judicial nomination hearings, and particularly potentially their effect, if there is an effect. If you have been attacked strongly enough by somebody in these hearings to any degree, does that effect what you might do later on?

JUDGE WALD: Well, it did not affect me, and I did have a very controversial confirmation, as my good friend and colleague Judge Sentelle in the first row will attest to. I think if you have the skin, the tough skin, to go through the confirmation hearings, especially if there is controversy, then it has been my experience that it does not affect you afterwards.

JUDGE BOGGS: I have seen people on my own court as they come on perhaps a little bit scarred, and that falls away very, very quickly, it seems to me. Now I guess in the Supreme Court you expect everyone to be controversial, although as it turned out, Ginsburg and Breyer were not as controversial. But everybody goes in, I think, thinking that it is not going to happen to them, so I really do not think people are discouraged in ad-

vance from seeking office. It is almost like that quote from the death penalty cases that the people who end up being the most abused, it is like it is freakish, like being struck by lightning, that you end up being designated by the Senate Judiciary Committee as the designated piñata for that part of the hearings.

JUDGE BEA: If you have been through a judicial election, a Senate nomination is a walk in the park.

JUDGE JACOBS: Yes sir.

AUDIENCE PARTICIPANT: (off-mic).

JUDGE JACOBS: Does the threat of dividing the Ninth Circuit and the other related issues for organizing the judiciary bespeak a threat to the judiciary?

JUDGE BEA: I have a little bit of experience in that. There are judges who are very much for the split, and there are judges who are very much against the split. We talk about it, but it never affects our judicial opinions that I am aware of. It does not have any effect on the judges when we are judging cases. We clash in front of the Senate judiciary committees. We clash on the pages of the Federalist publications. But I do not think it has any effect upon our judicial independence.

JUDGE JACOBS: We will take one or two more questions.

Yes sir.

AUDIENCE PARTICIPANT: I think many years ago, Henry Hart—and you will correct me if someone here knows this article—made some provocative remarks about the removal of jurisdiction from federal courts, particularly with regard to the Bill of Rights.[32] And he posed this question: Would it be constitutional for the Congress to take away the court's jurisdiction to hear cases involving individual rights? And as I remembered, his position was, as long as there were courts open, in this case state courts, to hear those cases, there is no monopoly on the federal courts reviewing these cases.

32 *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

JUDGE JACOBS: Any comments?

JUDGE BEA: Well, I think that was his position—and I can't remember his name, he was from Stanford. Gerald Gunther wrote a very long article in 1984 about that and came to the conclusion that Hart was right and that as long as it was the well-drafted jurisdiction-stripping bill, it would be found to be constitutional.[33] But that was his opinion.

JUDGE WALD: I certainly would—I hold my fire on the constitutionality of it because I am familiar with the debate and some of the authorities. I am not absolutely convinced that that is how far Congress could go in removing the appellate jurisdiction of the federal courts. But I think more important is there is still something that I will loosely call the spirit of Constitution, and I think the notion, if you took away review from the federal courts on most of the independent components of the Bill of Rights—whether you want to call it a legal question that judges should not worry about or a policy question which all Americans, including judges, should worry about in terms of the spirit of the Constitution—I think it would be a very serious question.

JUDGE JACOBS: That is the last question. We could go on a long time, but there's another panel. Thank you very much to the members of the panel.

(Panel concluded.)

33 *See* Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 921 (1984).