

“You’d Better Be Good”:
Congressional Threats of Removal Against Federal Judges

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The apparent state of relations [between Congress and the judiciary] is more tense than at any time in my lifetime.²

When the political branches get involved in a specific case that’s pending before the judge, or when the political branches start going after a judge or making threats in a way that affects ongoing cases, that interference oversteps the line of judicial independence. The political branches may well be right to stand that line and criticize judges. But they should not do so while cases or issues are still pending before the judge. If they do so, and the criticism cuts so deeply, as it may have done in the *Bayless*³ case, the best response is for the judge to step back from the case and recuse himself. He should do so not because he is going to be influenced by political threats, -- I think few judges are, and I don’t think Judge Baer was -- but because the public perception is going to be that the latter decision -- whether to stick to his original decision or to change his mind -- will have been the result of political pressure.⁴

The judicial branch has lately become the subject of an increasing and far ranging scrutiny and distrust by its legislative counterpart. Congressional suspicion is often directed toward judges’ traditional discretion in criminal sentencing and, more generally, the degree to which judges are beholden to (and, therefore, exercise case-by-case judgment by reliance upon) a particular ideological point of view or personal bias. The distrust has bred a potent strain of

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² Justice Sandra Day O’Connor, Address at 2004 Ninth Circuit Conference, as reported in Jeff Chorney, *O’Connor to Judges: Explain Yourselves*, THE RECORDER (July 23, 2004).

³ *United States v. Bayless*, 913 F. Supp. 232, 243 (S.D.N.Y.), *vacated on reconsideration*, 921 F. Supp. 211 (S.D.N.Y. 1996).

⁴ Hon. Alex Kozinski, *The Many Faces of Judicial Independence*, 14 GA. ST. U.L. REV. 861, 872-73 (1998).

political opportunism which Congress has manifested in several recent bills. One of these, the Feeney Amendment to the PROTECT Act,⁵ all but eliminates what was once the judge's province and tacitly threatens judges' continued employment. Likewise, Congress is considering legislation that would disavow citation in judicial opinions to foreign legal sources.⁶ The consequences to maverick judges who disregard the congressional will about what should and 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. 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.

The natural progression of these tendencies may or may not be toward more frequent impeachment of federal judges; it is probable, however, that the future holds more threats of removal.⁷ This article explores the use of threats of removal against federal judges and why the

⁵ Pub. L. No. 108-21, 117 Stat. 650, 667-676 (2003) (to be codified at 18 U.S.C. § 3742).

⁶ H.R. Res. 568, 108th Cong. (2004).

⁷ A few snapshots of recent events (in March of 2004 alone) are illustrative. *See, e.g.*, Tom Curry, *A Flap Over Foreign Matters at the Supreme Court: House Members Protest Use of Non-U.S. Rulings in Big Cases* (March 11, 2004), available at www.msnbc.msn.com/id/4506232 (noting the statement of Florida Congressman Tom Feeney 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 (March 16, 2004), available at www.house.gov/judiciary/news031604 (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 . . . [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 . . .").

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* (April 20, 2004), available at www.boston.com/news/local/massachusetts/articles/2004/04/20/ (reporting that Representative Emile J. Goguen

incidence of these types of threats 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 and House of Representatives Resolution 568 (which has not yet been enacted), that serve as able vehicles for legislators to level threats of removal against judges 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 itself. The second explanatory theory is based on the growing public perception (from within and outside the legal profession) of the judiciary as incapable of performing its judging function credibly. 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 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

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”), this article will focus primarily on threats to remove federal judges.

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 failure.

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)⁸ 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”⁹; and (2) federal judges “shall hold their Offices during good Behavior.”¹⁰ 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 impeachment, shall be by jury.”¹¹ There are no other constitutional details governing the conditions under which a federal judge may be removed.¹²

⁸ See Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 213 (1993).

⁹ U.S. CONST. art. II, § 4.

¹⁰ U.S. CONST art. III, § 1.

¹¹ 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 the object of the impeachment with the “concurrence of two thirds of all members present.” U.S. CONST. art. I, § 3, cl. 6.

¹² 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) (Tax Court judges); 38 U.S.C. § 7253(f) (judges

Moreover, Congress has never undertaken, by act, constitutional Amendment, or otherwise, to define or set the parameters encompassing the phrase “good behavior.”¹³ 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 sixteen persons have been tried by the Senate on impeachment by the House, and only seven of those were removed from office. Of that sixteen, however, twelve – 75% – have been federal judges, and seven have resulted in removals from office.¹⁴ In contrast to the number of impeachment trials, however, there have been fifty-eight judicial investigations by the House of Representatives (the first official act in the impeachment chain).¹⁵ 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

of the Court of Veteran Appeals); 10 U.S.C. § 942(c) (judges of the Court of Military Appeal); 28 U.S.C. § 631(i) (magistrate judges).

¹³ The “good behavior” standard was a carryover from English law. *See* 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 behavior” standard. Michael J. Mazza, *A New Look at an Old Debate: Life Tenure and the Article III Judge*, 39 GONZ. L. REV. 131, 135 (2004); *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 behavior” standard in order to “distinguish judicial tenure (life) from the tenure of elected officials (such as the president)[.]”).

¹⁴ The Senate has established a court of impeachment for the following federal judges: John Pickering, District Judge for the District of New Hampshire (removed from office March 12, 1804); Samuel Chase, Associate Justice of the U.S. Supreme Court (acquitted March 1, 1805); James H. Peck, District Judge for the District of Missouri (acquitted January 31, 1831); West H. Humphreys, District Judge for the Middle, Eastern, and Western Districts of Tennessee (removed from office June 26, 1862); Charles Swaine, District Judge for the Northern District of Florida (acquitted February 27, 1905); Robert W. Archbald, Associate Judge, U.S. Commerce Court (removed January 13, 1913); George W. English, District Judge for the Eastern District of Illinois (resigned November 4, 1926, proceedings dismissed); Harold Louderback, District Judge for the Northern District of California (acquitted May 24, 1933); Halsted L. Ritter, District Judge for the Southern District of Florida (removed from office April 17, 1936); Harry E. Claiborne, District Judge for the District of Nevada (removed from office October 9, 1986); Alcee L. Hastings, District Judge for the Southern District of Florida (removed from office October 20, 1988); Walter L. Nixon, District Judge for the District of Mississippi (removed from office November 3, 1989).

¹⁵ Edward D. Re, *Article III Federal Judges*, 14 ST. JOHN’S J. LEGAL COMMENT. 79, 89 (1999).

debilitating senility and alcoholism.¹⁶ 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.”¹⁷ The day after the removal of Judge Pickering for incompetence (and only nominally, by his political adversaries, for high crimes and misdemeanors), eight articles of impeachment were brought against Justice Chase.¹⁸ 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 Chase’s political enemies in calling for his impeachment.¹⁹ 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.²⁰ Justice Chase was impeached by the House but acquitted by the Senate.

It has been observed that the impeachment and acquittal of Justice Chase “set a precedent

¹⁶ See HON. WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORICAL IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* 127 (1992).

¹⁷ *Id.* (citing ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL, VOL. III* (1919)).

¹⁸ See David P. Currie, *The Constitution in Congress: The Most Endangered Branch, 1801-1805*, 33 WAKE FOREST L. REV. 219, 249 (1998).

¹⁹ See REHNQUIST, *supra* note 16, at 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* 299, 250 (1973).

²⁰ See EMILY FIELD VAN TASSEL & PAUL FINKELMAN, *IMPEACHABLE OFFENSES* 101-07 (1999).

that no judge would ever be removed for high-handed decisionmaking.”²¹ An alternative view, however, is that the impeachment and acquittal of Justice Chase was the first 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 conduct that related specifically to Peck’s decisions in a particular case; Peck, too, was impeached and acquitted (though by only one vote in the Senate).²² 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” disbaring lawyers).²³ Judge Swayne was impeached and acquitted and Judge English was impeached and resigned prior to his trial.²⁴ The next judicial impeachment and acquittal pattern, the case of Judge Harold Louderback, does not follow the model: Louderback was impeached for engaging in financial improprieties and for bringing the bench into disrepute;

²¹ 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 overwhelmingly have been the primary targets of consummated impeachments. Michael J. Gerhardt, *Justice Rehnquist’s Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson*, 16 CONST. COMMENT. 433, 439 (1999) (book review).

²² Geyh, *supra* note 21, at 169; Michael I. Myerson, *Rewriting Near v. Minnesota: Creating a Complete Definition of Prior Restraint*, 52 MERCER L. REV. 1087, 1110 (2001).

²³ Geyh, *supra* note 21, at 169 n.45.

he was subsequently acquitted.²⁵

Most interesting for understanding the implications of the “bad behavior” model is the case of Judge Harold Baer, Jr. In 1996, Judge Baer suppressed evidence of narcotics activity based on a finding that the police had conducted an illegal search,²⁶ and the government filed a motion for reconsideration shortly thereafter. In that election year, Baer’s decision elicited an immediate and violent 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.²⁷ Former Senator Bob Dole, then the Republican presidential candidate, threatened Judge Baer with impeachment and 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.²⁸ Judge Baer granted the motion.²⁹

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

²⁴ *Id.*

²⁵ Michael J. Gerhardt, *Putting the Law of Impeachment in Perspective*, 43 ST. LOUIS U.L.J. 905, 922 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 in the House of investigating or impeaching officials for any conduct – official or unofficial – viewed as bringing an office ‘into disrepute’ or raising compelling questions of legitimacy.”

²⁶ *United States v. Bayless*, 913 F. Supp. 232, 243 (S.D.N.Y.), *vacated on reconsideration*, 921 F. Supp. 211 (S.D.N.Y. 1996).

²⁷ See Jon O. Newman, *The Judge Baer Controversy*, 80 JUDICATURE 156, 157 (1997).

²⁸ Michael J. Gerhardt, *Impeachment Defanged and Other Institutional Ramifications of the Clinton Scandals*, 60 MD. L. REV. 59, 74 (2001).

²⁹ 921 F. Supp. 211, 216-17 (1996).

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.³⁰ 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 the 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 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.³¹

This statement is revealing in that it typifies Congress’ present approach when faced with judicial conduct that may not be egregious enough for impeachment³² 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 independent basis for removal other than those specified in the impeachment clauses.”³³ When confronted with likely

³⁰ Gerhardt, *supra* note 28, at 74; Thomas I. Vanaskie, *The Independence and Responsibility of the Federal Judiciary*, 46 VILL. L. REV. 745, n.126 (2001) (“The implication that the threats of removal affected the judge’s ruling is apparent.”).

³¹ Newman, *supra* note 27, at 162-63 (quoting then Senator Dole’s letter of April 9, 1996 to Judges Lumbard, Feinberg, Oakes, and Newman) (citation omitted).

³² See Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U.L. REV. 973, 989 (2001).

³³ MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 83-86 (2d ed. 2000). Gerhardt goes on to conclude that the second alternative is more consistent with historical evidence.

unimpeachable but highly politically objectionable (for Dole) behavior, Dole made intentionally murky the type of conduct that would qualify for impeachment by emphasizing Congress' 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' insistence that the possible grounds for impeachment are not capable of close definition, and depend more on particular legislative whimsy.³⁴ Thus, while actually impeaching a judge remains as complicated and lengthy a process as ever, threatening a judge with impeachment, and 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.³⁵ Whether or not Judge Baer (or anyone else) believed that he would be impeached based on his disposition of the motion for reconsideration in

³⁴ 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," and therefore that there is no difference between the grounds upon which elected officials and judges may be impeached. *See, e.g.*, GERHARDT, *supra* note 33, at 83-86; LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 2-7, at 166 (3d ed. 2000). Nevertheless, since the issue is not entirely resolved, *see, e.g.*, RICHARD POSNER, *AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 103-04* (1999) (arguing that there should be different standards for impeaching judges and elected officials); Geyh, *supra* note 21, at 164 (defining one of the elements of "doctrinal [judicial] independence" as requiring that Congress "not remove judges during good behavior"), and since it is in Congress' 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.

³⁵ 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 28, 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.").

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.

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 one in mind of 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.”³⁶

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.³⁷ And few would dispute that bribery, extortion, and embezzlement of public funds are all examples of “bad” behavior.³⁸ The grayer shades come into focus when one considers an act that arguably violates “public rights and duties” owed to society at large,³⁹ or “which in some way corrupts or subverts the judicial or governmental process,” or which is “plainly wrong in [itself] to a person of honor, or a good

³⁶ TACITUS, THE ANNALS AND HISTORIES, Book XIII, ch. 33 (Alfred John Church, trans., The Modern Library Classics 2003).

³⁷ 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.”).

³⁸ 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). To these surely could be added most felonies. See Akhil R. Amar, *On Judicial Impeachment and Its Alternatives, Remarks Prepared for the National Commission on Judicial Discipline and Removal* 4-5 (Dec. 18, 1992).

³⁹ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 5 (1765-69).

citizen.”⁴⁰ With time, the frustrations and uncertainties of sorting out the ethical and semantic nuances suggested by these phrases may well lead to cynicism⁴¹ 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 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 1984⁴² (SRA) and the Federal Sentencing Guidelines⁴³ 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

⁴⁰ CHARLES L. BLACK, JR., *IMPEACHMENT: A HANDBOOK* 37 (1974). A similarly undetailed framework for understanding what is impeachment-worthy classifies impeachable behavior into two sub-genera: “It [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, willful, malicious, or gross conduct in the discharge of office to the great detriment of the United States.” John Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 *FORDHAM L. REV.* 1, 55 (1970) (but acts that “result from error of judgment or omission of duty . . . without the presence of a willful disregard, are not impeachable”).

⁴¹ 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: “An impeachable offense is whatever a majority of the House of Representatives [considers it] to be at any time 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.” *Cong. Rec.* 116, daily ed. (April 15, 1970): 11,913.

⁴² Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586 and 28 U.S.C. §§ 991-998).

⁴³ 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 (1989) (holding that Congress’ delegation of legislative power to the Commission to create the Guidelines is constitutional).

proportionate to the crimes committed.⁴⁴ The Guidelines themselves support these aims.⁴⁵

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 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 play in the joints of the guidelines structure.⁴⁶

It seems plausible enough 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.⁴⁷ Some of these reasons

⁴⁴ See Oversight of the U.S. Sentencing Commission: Hearing of the Senate Judiciary Comm., Subcomm. On Criminal Justice Oversight (2000) (testimony of Sen. Thurmond) (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).

⁴⁵ See Editorial Note 3, USSG § 1A1.1 (emphasis in original):

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 criminal offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity.

⁴⁶ Selya & Massaro, *supra* note 44, at 803.

⁴⁷ See 18 U.S.C. § 3553(b) and Guidelines Manual § 5K2.0. Section 3553(b) permitted departure if “the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into

were expressly deemed legitimate in all situations,⁴⁸ while others depended on ad hoc judicial assessments. Appellate courts were empowered to review sentencing departures and overturn them if “unreasonable”,⁴⁹ which the Supreme Court interpreted as appellate review for abuse-of-discretion.⁵⁰

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, first term Representative Tom Feeney of Florida, “who it appears had never before expressed any interest or insight into sentencing, federal or otherwise”)⁵¹ was enacted as part of the Prosecutorial Remedies and Tools Against the Exploitation of Children Today (PROTECT) Act (or “Amber Alert”),⁵² whose essential purpose, the creation of a national reporting system

consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” The Policy Statement in the Guidelines explaining the operation of this section highlights the continuing importance of judicial discretion in the context of departure: “Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance.”

⁴⁸ *E.g.*, 28 U.S.C. § 994(n) (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 of prosecution of another person who has committed an offense”).

⁴⁹ *See* 18 U.S.C. § 3742(f)(2).

⁵⁰ *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.”).

⁵¹ Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1241 (2004).

⁵² Pub. L. No. 108-21, 117 Stat. 650, 667-676 (2003) (to be codified at 18 U.S.C. § 3742). The Feeney Amendment appears at section 401 of the PROTECT Act.

for child kidnappings, has little obvious connection with regulating or curtailing the powers of the judiciary.⁵³

Nevertheless, the Feeney Amendment represents the greatest restriction of judicial sentencing power since the SRA. 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, as a rider to the PROTECT Act, and was passed by the House of Representatives with little discussion. Feeney I dispensed with certain express grounds for downward departure (e.g., aberrant behavior, family ties, and military service). But it also altogether eliminated the ad hoc category of downward departure, limiting the grounds for departure to those selected factors explicitly listed in the Guidelines.⁵⁴ Professor Zlotnick has observed that Feeney I's wholesale abolition of judicial discretion in sentencing may well have been catalyzed by the "Judge Rosenbaum Debacle."⁵⁵ But the confrontation between the House Judiciary Committee and Judge Rosenbaum was, in many ways, merely symbolic of the long-standing and pervasively suspicious resentment among several in the Committee and in Congress generally that too many judges are "soft on crime" and overly prone to depart downward.⁵⁶ Those suspicions created an opportunity for Congress to

⁵³ See the statement of Senator Edward Kennedy (MA), expressing the view that the Feeney Amendment "ha[s] nothing to do with children, and everything to do with handcuffing judges and eliminating fairness in our Federal sentencing system." 149 Cong. Rec. S6711 (May 20, 2003).

⁵⁴ 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).

⁵⁵ *Id.* at 225. 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.

⁵⁶ *Id.* at 226.

assert its power over the judiciary by implementing new rules that, as I will show below, tacitly threaten judges' job security.

The enacted version of the Feeney Amendment (Feeney II) reflects just that. Feeney II eliminates judicial discretion with respect to unenumerated downward departures for crimes involving pornography, sexual abuse, child sex, and child kidnapping and trafficking.⁵⁷ It also makes 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 are the substitution of de novo appellate review for *Koon*'s abuse-of-discretion standard⁵⁸ and the requirement that a prosecutor make a motion for the last point in a three-level reduction for acceptance of responsibility.⁵⁹ To be sure, these restrictions weaken the discretionary power of judges, but they have few psychological overtones or implications for judges. The de novo standard of review expresses a preference for greater intra-judicial scrutiny of downward departures; it probably will result in more reversals merely because appellate judges will be freer to do as they will.⁶⁰ Whether or not this occurs, the district judge is 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 at any stage in

⁵⁷ PROTECT Act, § 401(a), (b), 117 Stat. 650, 667-68.

⁵⁸ *Id.* at § 401(d), 117 Stat. at 670-71.

⁵⁹ *Id.* at § 401(g), 117 Stat. at 671.

⁶⁰ I have some hesitation with Professor Zlotnick's conclusion that de novo review will necessarily increase ideologically-based reversals. He argues that “the increasingly conservative appointees on the Courts of Appeals are less likely to agree with the district court judges in close cases.” Zlotnick, *supra* note 54, at 231. The present administration has appointed notably conservative judges; another President's appointees may be less so. There is no reason to expect that, as a result of the de novo standard, the downward departure decisions of President Bush's appointees to the district court will be reversed by a future, more liberal President's appointees to the court of appeals.

litigation), will be given greater appellate attention. But there is little reason to believe that this finer review would strike 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, for example, the loss of employment in response to a decision that displeases.

By contrast, the “minatory” limitations 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, sex of the offender; and information regarding several factors made relevant by the guidelines.”⁶¹ 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”⁶² Zlotnick notes that “one cannot really argue that Congress should be forbidden from collecting this information,”⁶³ 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 requirements⁶⁴ could not represent anything other than a threat to

⁶¹ PROTECT Act § 401(h), 117 Stat. at 672.

⁶² *Id.*

⁶³ Zlotnick, *supra* note 54, at 233.

⁶⁴ So paperwork intensive is the reporting requirement that in order to comply with it, Judge Donald Molloy of the District of Montana issued a “standing order” directing the U.S. Attorney, within twenty days of any particular sentencing, to assemble and file with the court clerk a report of the sentence. *United States v. Ray*, --- F.3d ---, 2004

sentencing judges – essentially, expressing the sentiment, “we’re watching you,” and nothing else.⁶⁵ What is the point of this type of surveillance? “A tool for intimidation” is one oft-voiced answer,⁶⁶ and it may be that Congress intended the reporting requirement as a bullying device for its own sake; by compiling sentencing statistics, Congress may be intimidating judges into departing downward less frequently merely to keep Congress happy. But intimidation is generally simply a means to a desired end, and a deeper purpose may therefore exist. Congress has the power to impeach the judge if he does not satisfy, cumbersome as that process may be. In fact, Congress’ *only* constitutional tool of control over the employment of individual, life-tenured federal judges is the broadsword of impeachment;⁶⁷ it is not far-fetched to claim that one of the most plausible purposes for the reporting requirement, therefore, is to threaten a judge

WL 1636928, at *1 (9th Cir. Jul 23, 2004). The Ninth Circuit upheld the standing order as constitutional, and not a violation of the separation of powers doctrine. *Id.* at *12-13.

⁶⁵ 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, 1324 (D. Utah 2003); *see also United States v. Schnepfer*, 302 F. Supp. 2d 1170 (D. Haw. 2004) (parroting *VanLeer*). That sentencing decisions are public records and widely available, however, is not logically connected to the conclusion that Congress’ intent in imposing the reporting requirement was benign; in fact, just the opposite conclusion is far more compelling.

⁶⁶ Zlotnick, *supra* note 54, at 233.

⁶⁷ 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 (1999). I focus on individual judges because Congress has other tools, such as the power to strip jurisdiction, over the judiciary as a whole. 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. (Wall.) 128 (1872) (holding that Congress cannot constitutionally direct particular results in given cases).

with removal from the bench unless he imposes sentences that pass congressional muster (and generally, that means sufficiently harsh sentences).⁶⁸

Feeney II also bars district courts whose downward departures have been reversed (under the new de novo standard) on appeal from providing another reason to depart on remand.⁶⁹

This rule is a clear indication that Congress is not really serious about an accurate application of its own Guidelines.⁷⁰ 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 would be intolerable to permit that judge a second opportunity, even if circumstances are such that a correct application of the Guidelines would permit or require it. Again, the “no seconds” rule requires an assessment of congressional motivation. Since it does not correlate to a more accurate system of sentencing,⁷¹ the reasons for it must be discerned elsewhere. One plausible 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 in a given case and who are reversed are more likely to do so in the same case

⁶⁸ Cf. the comments of Representative Feeney in a recent interview with the *Legal Times*: “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.’” Tony Mauro, *Rehnquist’s Olive Branch Too Late?*, *LEGAL TIMES*, June 1, 2004.

⁶⁹ PROTECT Act § 401(e), 117 Stat. at 671.

⁷⁰ This point is made by Professor Miller, who has commented on Congress’ deep dissatisfaction with and “true anger” at the Guidelines, in addition to its belief that the Guidelines are overly moderate. See Miller, *supra* note 51, at 1248.

⁷¹ That the “no seconds” rule is irrational from the perspective of sentencing accuracy is easily demonstrable. A judge who departs downward for reason A, and who is reversed, may realize on remand that reasons B, C, or D are also legitimate grounds upon which to depart. Or, 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.

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 after remand.⁷² Perversely, if adopted this practice will artificially pad a judge’s departure statistics; the “no seconds” rule will increase the quantity of data contained in the individual reports to Congress, but may not reflect the judge’s true inclinations toward departures.

The reaction of federal judges to the Feeney Amendment has, unsurprisingly, been overwhelmingly negative.⁷³ Chief Justice Rehnquist himself called it “an unwarranted and ill-

⁷² See Tracy Friddle, John 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).

⁷³ See, e.g., Miller, *supra* note 51, at 1248-50 (citing angry reactions to the Feeney Amendment in decisions by Judge Robert P. Patterson in *United States v. Kim*, 2003 WL 22391190, at *7 (S.D.N.Y. Oct. 29, 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.”)); *In re Sentencing*, 219 F.R.D. 262 (E.D.N.Y. 2004) (in response to the Feeney Amendment, Judge Jack B. Weinstein required that all sentencings be videotaped for appellate review because he felt that the reviewing court should see and hear the defendant); *United States v. Mendoza*, No. 03-CR-730-ALL, 2004 WL 1191118 (C.D. Cal. Jan. 12, 2004) (Judge Dickran Tevrizian held the reporting requirement is 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*, No. 03-3632, 2003 WL 23010704 (8th Cir. 2003) (basis of appeal is the statement of 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); *United States v. Khan*, --- F. Supp. 2d ---, 2004 WL 1616460, at *16 (E.D.N.Y. July 20, 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.”). 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

considered effort to intimidate individual judges in the performance of their judicial duties,”⁷⁴ and even adverted indirectly, in the context of the reporting requirement, to Congress’ looming impeachment power.⁷⁵ Chief Judge William Young (D. Mass.) suggested (only partly sarcastically) that the “no seconds” rule was in all likelihood overtly intended to correct the waywardness of his own past sentencing practices.⁷⁶ He also took great pains to make perfectly clear that the Feeney Amendment does not intimidate him⁷⁷ (in contrast to Judge Magnuson (D. Minn.), who admits his intimidation)⁷⁸ and that he continues to have confidence in “the

David M. Zlotnick, *Shouting Into the Wind: District Court Judges and Federal Sentencing Policy*, 9 ROGER WILLIAMS U.L. REV. 745 (2004).

⁷⁴ 2003 Year-End Report on the Federal Judiciary, available at www.supremecourtus.gov/publicinfo/year-end/2003year-endreport.html; see also Gina Holland, Justice Raps Sentencing Rules, Associated Press, March 18, 2004, available at www.boston.com/news/nation/articles/2004/03/18/justice_raps_sentencing_rules/ (in reaction to the Feeney Amendment, Justice Kennedy stated: “The mandatory minimums enacted by Congress are in my view unfair, unjust, unwise.”).

⁷⁵ See *supra* note 74 (Chief Justice Rehnquist stated: “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.”).

⁷⁶ *United States v. Green*, --- F. Supp. 2d ---, 2004 WL 1381101, at *12 & n.120 (D. Mass. June 18, 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’ “apparent[] disgust[] with 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).

⁷⁷ 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, who reports the comments of Judges Roger J. Miner and Chester J. Straub of the Second Circuit in the panel hearing on *United States v. Santiago*, 76 Fed. Appx. 397 (2d Cir. 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.” As the prosecutor responded, Judge Straub interjected: “Be sure you spell them correctly. Especially Straub S-T-R-A-U-B.”

⁷⁸ 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*, 2004 WL 1381101, at n.157 (citing Elizabeth Stawickie, Minnesota Public Radio, *Judge Speaks Out Against Congress*, *Ashcroft*, Oct. 22, 2003, at http://news.minnesota.publicradio.org/features/2003/10/22_stawickie_sentencing/).

constitutional protections designed to insure an independent judiciary.”⁷⁹ 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.⁸⁰ Judge Robert J. Cindrich (W.D. Pa.) resigned in at least indirect response to the new sentencing policies, calling them “morally wrong.”⁸¹ 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 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 so soon after the passage of the Feeney Amendment.⁸² 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.”⁸³ If the reporting requirement or the other

⁷⁹ *Green*, 2004 WL 1381101, at *15.

⁸⁰ 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 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 justice system.”).

⁸¹ Associated Press, *Federal Judge Rips Sentencing Guidelines as He Steps Down*, Feb. 2, 2004, at WL 2/2/04 APWIRE 07:23:34.

⁸² 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 73, at 650 & 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)).

⁸³ Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service – And Disservice – 1789-1992*, 142 U. PA. L. REV. 333 (1993).

rules imposed by the Feeney Amendment⁸⁴ 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.⁸⁵

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 conflict between the judiciary and the legislature, and consequently, as this article argues, 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 that we should expect more frequent threats of removal deriving from Congress' 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 institutions unless such foreign judgments, laws, or pronouncements are incorporated into the legislative history of laws

⁸⁴ Though the JUDGES Act, 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, *A Death Sentence for Justice: The Feeney Amendment Frustrates Federal Sentencing*, 49 VILL. L. REV. 693, 721 (2004).

⁸⁵ The Supreme Court's decision in *United States v. Blakely*, 124 S. Ct. 2531 (2004) held that the judicial factfinding procedures called for in the enhancement provisions of Washington State's determinate sentencing system violated the Sixth Amendment. Whether and how *Blakely* will affect the constitutionality of the Guidelines remains to be seen. Of course, a finding by the Supreme Court (or other lower federal courts, as has already occurred) that the enhancement provisions of the Guidelines are unconstitutional surely will do nothing to improve the tension between the two branches; neither, in all likelihood, will Congress' reaction.

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.⁸⁶

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”⁸⁷ – because it was perceived that barring citations to Blackstone,⁸⁸ Edmund Burke, or the King’s Bench was not exactly what the House had in mind.⁸⁹ 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.⁹⁰ 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;⁹¹ *Atkins v. Virginia*, in which Justice Stevens in his majority opinion cited to an amicus brief filed by the

⁸⁶ H.R. Res. 568, 108th Cong. (2004) (hereafter “Resolution 568”).

⁸⁷ Jeffrey McDermott, *Citation to Foreign Precedent: Congress vs. The Courts*, 51-JUL FED. LAW. 20 (2004).

⁸⁸ See *Foster v. Florida*, 537 U.S. 990, n., 123 S. Ct. 470, 154 L. Ed. 2d 359 (2002) (Thomas, J., concurring in denial of certiorari) (citing Blackstone approvingly but criticizing the views of the Supreme Court of Canada as, since “foreign,” presumptively suspect): “[T]his court’s Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans.”

⁸⁹ 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.

⁹⁰ See Hearing Statement of Representative Chabot, Committee on the Judiciary, March 25, 2004, available at www.house.gov/judiciary/chabot032504.htm.

⁹¹ 539 U.S. 558, 123 S. Ct. 2472, 2481-83 (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.* *Dudgeon* did not follow *Bowers v. Hardwick*, 478 U.S. 186 (1986) 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”

European Union;⁹² and *Grutter v. Bollinger*, in which Justice Ginsburg cited in her concurrence to an international treaty – the International Convention on the Elimination of All Forms of Racial Discrimination.⁹³ Congressman Chabot states his belief (and, presumably, that of the sponsors and proponents of Resolution 568) that “Americans are subject to the decisions of a United States Supreme Court that are based, at least in part, on selectively cited decisions drawn from a variety of foreign bodies.”⁹⁴

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’ will to power in another area traditionally reserved to the judge – the

⁹² 536 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 European Union as Amicus Curiae 4.”). Justice Stevens also cites to numerous research studies 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.

⁹³ 539 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.

⁹⁴ See Statement of Representative Chabot, *supra* note 90.

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” 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 the citation to foreign precedent with which they either are unfamiliar or disagree. Second, the solution proposed by Resolution 568 is not the wholesale disapproval 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 explained below, of the use of threats of impeachment in response to anticipated judicial noncompliance suggests that the 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. Moreover, even if passed, it merely would express Congress’ “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.⁹⁵ This is archetypal of the use of the threat

⁹⁵ See Mauro, *supra* note 68, quoting Congressman Feeney: “In discussing the resolution, Feeney suggested that invoking foreign precedents – increasingly popular from the Supreme Court on down in recent years – could be an

of impeachment as an instrument of political coercion: few may agree (Representative Feeney, of course, excepted) that the decision to cite to a foreign decision or legal statement is grounds for removal. It is certainly not a high crime or misdemeanor. But is it “bad” behavior? Citation to foreign precedent would certainly (assuming Resolution 568 becomes law, and, to a lesser degree, even if it does not) 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.⁹⁶ Such recurring acts of defiance might not be “good behavior”; following the model of Judge Baer, threats of impeachment would be the likely congressional response.⁹⁷

impeachable offense. Sensenbrenner, in his Judicial Conference speech, cited Feeney’s resolution favorably.”; McDermott, *supra* note 87: “The resolution’s sponsor even raised the possibility of impeaching judges who continue to cite foreign precedent.”

⁹⁶ 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”

⁹⁷ Congressman Feeney is an especially illuminating case study because he obviously favors threatened removals as a useful mechanism of judicial control. See *Hearing on the FY 2004 Department of Justice Budget Request*, (Apr. 8, 2003), 2003 WL 1849408 (F.D.C.H.). 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, you’re [the Executive branch] probably not in the court of last resort in terms of Article I powers But I . . . like Article I, especially now that I’m in Congress, and it seems to me that, at a minimum, Congress has the right to set the jurisdiction of federal judges harassing several dozen members of the Justice Department. It seems to be something that we could effect with our jurisdictional powers And then, ultimately, of course, there’s the question of judge’s good behavior.

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 And how is a judge . . . to discern which of the countries['] decisions] is appropriate to cite and which . . . is not. . . . They [the courts] are not competent to do so.⁹⁸

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 the judicial branch of government [W]e have this activist court that's taken over so much authority from the legislative branch So 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, 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.⁹⁹

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.¹⁰⁰ But by claiming that it is the judiciary that is usurping a historically legislative power, Representative King was able to invoke

⁹⁸ *Hearing on H.R. Res. 568 Before the Subcomm. on the Constitution*, 108th Cong. 112 (Mar. 25, 2004), 2004 WL 598895 (F.D.C.H.).

⁹⁹ *Id.*

¹⁰⁰ *See Marbury v. Madison*, 1 Cranch 137, 177, 2 L. Ed. 60 (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.”).

the sacred cow of separation of powers to support a general program whose first step 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 importantly, 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 control over the judiciary.

Representative Goodlatte’s comments specifically concern the enforcement of Resolution 568 (i.e., what happens to judges who disregard Congress’ “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 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 question . . . what measures the Congress could take to effectively exercise 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 courts?¹⁰¹

One of the “other things” that is already being done is to threaten judges with removal. The possibility inheres in Representative Goodlatte’s musing that “perhaps we could” use removal as an instrument of punishment, despite the “difficult[y]” of the endeavor to effect an actual

¹⁰¹ *Supra* note 98.

impeachment. Indeed, Representative Adam Schiff (CA) compared Resolution 568 to the reporting requirement of the Feeney Amendment, observing that both (“in combination”)¹⁰² might “have a chilling effect on the independence of the judiciary.”¹⁰³ 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 empowered to impeach and remove from offices 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

I want to raise a grave caution about the idea that the impeachment power ever would be used because of disagreement with a decision.¹⁰⁴

Representative Nadler (NY), commenting on Representative Feeney’s statements about the “ultimate remedy” for judicial noncompliance with Resolution 568, was more direct: “In other

¹⁰² *Id.*

¹⁰³ *Id.* The comparison was made in the form of a question to Professor Jeremy Rabkin, who did not answer it.

¹⁰⁴ *Id.*; *see also* statement of Representative Schiff that “[w]e are shooting across the bow [of the judiciary] when we threaten to subpoena the records of Judge Rosenbaum who comes before the panel and expresses what’s an unpopular opinion with the panel. We shoot across the bow when we use the word ‘impeachment’ in reference to the citing of foreign opinion [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.”

words, we're threatening impeachment if we disagree with the court. That is the definition of intimidation."¹⁰⁵

I do not wish to confuse (too much) the issue of the propriety of citation to foreign legal sources with my principal point – that Congress' 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 legitimate 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.”¹⁰⁶ Likewise, Professor 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.¹⁰⁷ “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 as illegitimate or otherwise un-American.”¹⁰⁸ Others have disagreed, arguing that

¹⁰⁵ *Id.*

¹⁰⁶ Harold Hongju Koh, *International Law as Part of Our Law*, 9 AM. J. INT’L L. 43, 53 (2004); *see also* Harold Hongju Koh, *Paying Decent Respect to International Tribunal Rulings*, 96 ASIL Proc. 45, 53 (2002). Professor Koh contrasts the “transnational” approach with “national jurisprudence,” favored in his view by Justices Scalia and Thomas.

¹⁰⁷ *See* Daniel Bodansky, *The Use of International Sources in Constitutional Opinion*, 32 GA. J. INT’L & COMP. L. 421, 423 & n.13 – 16 (2004).

¹⁰⁸ *Id.* at 426.

“[i]ncluding a new source [international law] fundamentally destabilizes the equilibrium of constitutional decision making,”¹⁰⁹ 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.”¹¹⁰ Judge Posner has recently presented four grounds for his conclusion that citation to foreign sources as persuasive argument should be avoided.¹¹¹ At least some of these reasons are, in my view, problematic,¹¹² but all of these arguments, pro- and con-, do not speak directly to a *congressionally* imposed categorical rule disallowing, with sanctioned exceptions, the inclusion of foreign sources in American

¹⁰⁹ Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT’L L. 57, 58 (2004).

¹¹⁰ Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INTL L. 69 (2004).

¹¹¹ Richard Posner, *Argument: Could I Interest You In Some Foreign Law? No Thanks, We Already Have Our Own Laws. The Court Should Never View A Foreign Legal Decision As A Precedent In Any Way*, 2004-AUG LEGAL AFF. 40 (2004).

¹¹² See e.g., Judge Posner’s “first problem” – that “according precedential weight to foreign or international decisions” offers “promiscuous opportunities” for citation. *Id.* at 41. Judge Posner 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 pored over by foreign judges and intended by them as precedent-setting and, on the other, the foreign equivalent of the unpublished decision. Of course, judges wishing to cite, for example, to 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’assise. Once a certain background knowledge is established, however, foreign precedent could add desirable nuance to the analysis of many issues in American law. See Vicki Jackson, *Argument: Could I Interest You in Some Foreign Law? Yes Please, I’d Love To Talk With You*, 2004-AUG LEGAL AFF. 43 (“Understanding references to foreign law in their legal and historic context should defuse unwanted criticisms, highlight the benefits of well-informed uses of foreign and international legal sources, and focus attention on some genuinely difficult questions.”).

Judge Posner’s second problem – that in order to cite foreign decisions credibly, American judges would have to possess a profound knowledge about the socio-political history of the country in question, as well as that country’s historical approach to the issue in question – 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?

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 Congressmen hope will be a far-ranging program of absorbing judicial power.

I have examined two legislative programs (the Feeney Amendment and Resolution 568) that strip federal judges of powers they traditionally held and I have 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 been enacted and 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, even lawsuits raising constitutional issues, related to homosexual sex and marriage.¹¹³ This bill passed in the House on July 22, 2004,¹¹⁴ and House Majority Leader Tom DeLay (TX) has “told reporters . . . that he plans to use ‘jurisdiction stripping’ measures to achieve other 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

¹¹³ 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 supra* note 98.

¹¹⁴ Mary Fitzgerald & Alan Cooperman, *Marriage Protection Act Passes; House Bill Strips Federal Courts of Power Over Same-Sex Cases*, WASHINGTON POST, July 24, 2004, at A4.

abortion.¹¹⁵ Obviously, the constitutionality of such measures is an unknown quantity.¹¹⁶

Nevertheless, these bills and others of similar stir very much represent the type of pervasive program envisioned by Representatives Feeney, King, Goodlatte, Chabot, DeLay and many others.¹¹⁷ 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.¹¹⁸

¹¹⁵ Kaplan, *supra* note 113.

¹¹⁶ *See Editorial: Muzzling the Courts?*, WASHINGTON 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 the 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.”

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, § 2, cl. 1. Whether, once established, Congress could limit these courts’ jurisdiction (or abolish them altogether) is another question.

¹¹⁷ *See supra* note 98, Statement of Representative Chabot: “We’ve not taken the step of using our authority under Article I, Section 8, for example, or to alter the appellate jurisdiction of the Supreme Court under Article II, Section 2. That step might be appropriate in the future”

In fact, Congress has already taken that step in other contexts. *See* Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153, 155 (2003) (“Members of Congress have introduced legislation to strip the federal courts of jurisdiction to hear cases on politically sensitive subjects, and Congress has gone so far as to enact procedures limiting the opportunity 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 (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.”).

¹¹⁸ 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 117, at 154 (“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

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 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.¹¹⁹ Political ideology, of course, jumps out immediately as a plausible motivation, 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* ruling to the recent decision overturning the Texas sodomy statute”¹²⁰ – 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

Property of the House Comm. On the Judiciary, 105th Cong. 8 (1997), Statement of Representative Bob Barr (GA): “It is time to start exploring how and in what way we might take steps to ‘rebalance’ and restore integrity to our Federal justice 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.”

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.

¹¹⁹ See Curry, *supra* note 7.

¹²⁰ See Zlotnick, *supra* note 54, at 250.

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.

But conservative ideology alone 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.¹²¹ The vitriolic tenor of these appointment battles is no less high pitched than in the contexts I have discussed, and, irrespective of one's political feelings, liberal ideology is the constitutional impediment, as it has been at many other times in the past.¹²² To this argument it may properly be 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

¹²¹ At no time in American history has the Senate been more active in blocking presidential appointees to the federal appellate bench. See *Review & Outlook (Editorial): The Filibuster Express*, WALL STREET JOURNAL, 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 . . ."); see also Michael J. Gerhardt, *Federal Judicial Selection as War, Part Three: The Role of Ideology*, 15 REGENT U.L. REV. 15 (2003).

¹²² Professor 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."

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, 637-39 (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."

what is intended by “ideology.” If we accept that one definition of ideology is “the ways in which meaning establishes and maintains relations of power,”¹²³ then it becomes critical to examine the way in which the legislature and judiciary share and compete for power to arrive at an answer to the question. 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 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 a logical impossibility. But what if the threat to remove a federal judge were, 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?

¹²³ 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, *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”).

I would argue that one basis for the use of the threat as an instrument of social and political control was first developed by Thomas Hobbes.¹²⁴ Following Professor Robin West, I set out (“[j]ust to refresh recollection”)¹²⁵ a passage of Hobbes’ *Leviathan* to frame my contention:

From this equality of ability, ariseth equality of hope in attaining our Ends. And therefore if any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies; and in this way to their End, (which is principally their own conservation, and sometimes their delectation only,) endeavour to destroy or subdue one another

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.¹²⁶

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.¹²⁷ “To deny

¹²⁴ 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).

¹²⁵ Robin West, *Reconsidering Legalism*, 88 MINN. L. REV. 119, 131 (2003).

¹²⁶ THOMAS HOBBS, *LEVIATHAN* 184-85 (C.B. MacPherson ed., 1968) (1651). This tract immediately precedes Hobbes’ most well-known description of the life of man in a state of nature (“solitary, poore, nasty, brutish, and short”).

¹²⁷ 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’ Empirical Natural Law on Title VII’s Effectiveness: A Hegelian*

employment . . . to those that seek it, is to Dishonour,”¹²⁸ and it is to be expected that many things which 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)¹²⁹ to obtain them. Only the “imperative law,” backed by threat of retribution for non-compliance,¹³⁰ 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.”¹³¹

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 in ways 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

Critique, 25 CONN. L. REV. 607, 615-17 (1993) (arguing that Title VII would be more effective if it “reflect[ed] a person’s inner subjectivity.”).

¹²⁸ HOBBS, *supra* note 126, at 154. 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 parallel refusal to deal with them bestowed dishonor.” McAdams, *supra* note 127, at n.25.

¹²⁹ McAdams offers a convincing claim that Hobbes’ 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).

¹³⁰ H.L.A. HART, *THE CONCEPT OF LAW* 16 (1961).

¹³¹ HOBBS, *supra* note 126, at 156.

to fulfill its obligations and each always suspects that the other will overstep the bounds of its powers given the right opportunity.¹³² The conditions are ideal for Hobbes' mutual "diffidence."¹³³ 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 in respect of 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.¹³⁴ 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 "glory" in the form of additional coveted, substantive powers formerly possessed by the judge and influence over the judge's decisions.

The conclusion is fortified by the reality that Congress' impeachment decisions, unlike all of its

¹³² 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.

¹³³ Hobbes' "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 *supra* note 126, at 184 ("And from this diffidence of one another, there is no way for any man to secure himself, 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[.]").

¹³⁴ Once the President nominates a judicial officer, the legislator (this time the Senate) also has another 'employment' power *viz-à-viz* 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 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, 220 (1980) (citing THE FEDERALIST No. 79 (Alexander Hamilton), pp. 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.")).

legislative functions, are *sui generis* in that they are not subject to any kind of review,¹³⁵ as well as by the fact that judges have no tools with which to resist. 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' 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.¹³⁶ It is not necessary, however, to accept Hobbes' 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.¹³⁷ 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."¹³⁸ Thus, according to Dore, executive

¹³⁵ 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."); *Nixon v. United States*, 506 U.S. 224, 231 (1993).

¹³⁶ See HOBBS, *supra* note 126, at 236 ("[A] kingdome divided in it self cannot stand."); see also Carl T. Bogus, *The Battle for Separation of Powers in Rhode Island*, 56 ADMIN. L. REV. 67, 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. HOBBS, *supra* note 126, at 291, 294.

¹³⁷ On the relevance of Hobbes' 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' state of nature), see West, *supra* note 125, at 146-147.

¹³⁸ 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).

review of judicial constitutional interpretation is “a step away from definitiveness in decisionmaking and hence problematic for social stability.”¹³⁹ 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 (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 which arguably would conduce to greater social stability in that ultimately it would centralize judicial power (or some judicial power) in the legislature.¹⁴⁰ 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.”¹⁴¹ That may well be true. But it raises the possibility that Congress’ 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

¹³⁹ *Id.*

¹⁴⁰ 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 of pro and con of doing the act.” H.L.A. HART, *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 253 (1982).

¹⁴¹ Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. CAL. L. REV. 673, 690 (1999).

moral reaction generally evoked by the word “threat,” the threat and its purposes are more rationally understood as merely 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.”¹⁴² 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.”¹⁴³ 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 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 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’ wrath and informs the Court about congressional preferences on a particular issue and their relative salience.¹⁴⁴

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.

¹⁴² W. Michael Reisman, *Assessing the Benefits of Nonmilitary Enforcement: The Case of Economic Sanctions*, 89 AM. SOC’Y INT’L L. PROC 337, 351 (1995).

¹⁴³ See THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 5 (1963).

¹⁴⁴ Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U.L. REV. 1437, 1462 (2001).

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.”¹⁴⁵ 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. I would argue that Congress has seized upon an increasing public faithlessness as to the legitimacy of the grounds upon which judges judge in order to advance its own political ends. In short, 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 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.

In a recent article entitled “Culture of Quiescence,” Professor Carl T. Bogus argues that there is “a strongly enforced taboo within the Rhode Island legal culture against criticizing the

¹⁴⁵ RICHARD A. POSNER, *OVERCOMING LAW* 110 (1995).

state's governmental institutions, particularly its courts.”¹⁴⁶ Though he concentrates specifically on Rhode Island, 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.¹⁴⁷ 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.”¹⁴⁸ 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.¹⁴⁹

Bogus’ 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.¹⁵⁰ 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”¹⁵¹ Similar points about the value of lawyer criticism of the judiciary have been made by Professor Monroe Freedman, who claims that

¹⁴⁶ Carl T. Bogus, *Culture of Quiescence*, 9 ROGER WILLIAMS L. REV. 351, 353 (2004).

¹⁴⁷ *Id.* at 352.

¹⁴⁸ *Id.* at 352.

¹⁴⁹ *Id.* at 353.

¹⁵⁰ *Id.* at 372.

¹⁵¹ *Id.* at 394.

lawyers “are particularly knowledgeable about judges’ conduct, and are therefore in a position to inform the public about abuses of judicial power.”¹⁵² For Bogus, the present state of affairs is a general systemic malady:

[T]he problem is not limited to the federal district court. This is a problem in the wider professional culture – a culture 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.¹⁵³

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 forth. 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. Bogus argues that these bromides about the unassailable righteousness of criticism apply wholesale to the judiciary, but 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

¹⁵² 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).

¹⁵³ Bogus, *supra* note 146, at 392-93.

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 criticism's social virtues should be listed several of its negative qualities and consequences: criticism is destabilizing; criticism can corrode institutional foundations; criticism can be self-serving, mean-spirited, lacking in depth, and motivated by something quite other than the improvement of the criticized.¹⁵⁴ These darker sides to criticism are 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. I say “perceived” 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 too much tarnished, or disprized, or criticized, it becomes impossible for judges to perform their function, and, indeed, for a society

¹⁵⁴ See James Boyd White, *Free Speech and Valuable Speech: Silence, Dante, and the “Marketplace of Ideas”*, 51 U.C.L.A. 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 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 speech that makes up our shared world takes this form. Rather, the bulk of our public speech is commercially and politically driven”

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. 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.

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.”¹⁵⁵ The public perception of 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

¹⁵⁵ 505 U.S. 833, 865 (1992) (emphasis mine). 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 mine).

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

[T]he 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, 274-75 (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

that the Court’s legal conclusions are sound, or that its holdings are well-reasoned, rhetorically persuasive, or analytically comprehensive.¹⁵⁶ If criticism of this kind is to be offered, it is the law scholar, practicing specialist or 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.¹⁵⁷

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.¹⁵⁸ To return to Hobbes, “[i]t is

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.

¹⁵⁶ This is in large part because most people don’t know what judges do. See Stephen P. 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 Disaffection with the Administration of Justice*, Address at the Convention of the American Bar Association, Aug. 26, 1906, 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 workings of courts due to ignorant and sensational reports in the press.”); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty*, 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”).

¹⁵⁷ A similar point has been made by Professor White:

When we turn to a judicial opinion, then, we 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 itself can be analyzed and judged.

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

¹⁵⁸ 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

not Wisdom, but Authority that makes a law.”¹⁵⁹ 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 they do.¹⁶⁰ 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.¹⁶¹

Too easily does Bogus dismiss the damage that criticism can inflict on the judiciary: “[t]hey have life tenure Courts can take care of themselves.”¹⁶² Life tenure, as we have seen, is one of the mechanisms that renders rather procedurally complicated the process of ousting a judge by impeachment and conviction. 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 sufficient, of itself, to guarantee a well-functioning

invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals.” (emphasis mine).

¹⁵⁹ THOMAS HOBBS, A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND 55 (Joseph Cropsey ed. 1971) (1681).

¹⁶⁰ Indeed, legitimacy based on authority may by its very nature mutually exclude 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.”).

¹⁶¹ 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 impacts). 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.

¹⁶² Bogus, *supra* note 146, at 392, 394.

judiciary.¹⁶³ 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."¹⁶⁴ Moreover, for Bogus to cite life tenure, in isolation, as a reason that we should not worry or care about the state of 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.¹⁶⁵ It is difficult to see how this type of criticism would do much to improve the judicial institution, though it would certainly increase social fragmentation, hostility, polarization and resentment.

¹⁶³ The successful judiciary requires a good deal more tending. Professor Redish has divided the concept of "judicial independence" into three categories: "institutional independence," "judicial/lawmaking independence," and "countermajoritarian 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." 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)).

¹⁶⁴ Geyh, *supra* note 21, at 161.

¹⁶⁵ Bogus, *supra* note 146, 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 . . . 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 recognized 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.").

Whether or not one agrees that criticism of the judiciary is unqualifiedly desirable, it is something else again 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 great abundance. There are numerous surveys reporting on the public’s discontent with judges and the state of the judiciary;¹⁶⁶ the national debate rages like never before on the importance and proper parameters of judicial independence and accountability, with arguments for and against criticism of the judiciary and individual judges abounding;¹⁶⁷ bar associations and other attorney organizations have formed commissions in

¹⁶⁶ 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, 872 (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 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 widespread 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 the 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.”; *American Bar Association Report on Perceptions of the United States Justice System*, 62 ALBANY L. REV. 1307, 1321 (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 confident or extremely confident in the Supreme Court [but] [i]nterestingly, only 34% said the same of the federal courts.”); Geyh, *supra* note 132, 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.”

¹⁶⁷ Law school symposia and conferences in the past ten or so years alone 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, Accountability, and Separation of Powers Issues (2003); the University of Pennsylvania’s Conference on Judicial Independence at the Crossroads: Developing an Interdisciplinary Research Agenda (2004); Fordham University’s “Special Series: Judicial Independence”; the University of Southern California’s Judicial Independence and 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

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;¹⁶⁸ the media have taken an unprecedentedly aggressive role in criticizing judges and their decisions;¹⁶⁹ and judges themselves have become far more outspoken critics of their colleagues than ever before.¹⁷⁰

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 treat 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 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.

¹⁶⁸ See, e.g., Am. Bar Ass'n, Judicial Div. Lawyers Conference & Special Committee on Judicial Independence, *Response to Criticism of Judges* (1998); Am. Bar Ass'n Comm'n on Separation of Powers and Judicial Independence, *Report: An Independent Judiciary – 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., September 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, 341-42 (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 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."

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." See Bogus, *supra* note 146, at 353.

¹⁶⁹ 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* (2004), and 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 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, 187 (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

We are at a considerable distance from Bogus' 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.¹⁷¹ In analyzing the effects of *Bridges v. California*,¹⁷² 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 scandalizing 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

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

Whether or not one agrees with Professor Garry, the quantity of media coverage, and criticism, 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 has exponentially increased the quantity of reporting and criticism of matters judicial.

¹⁷⁰ 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 Minnesota 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, they must permit judicial candidates to exercise their full free speech rights under the First Amendment). Judicial campaign speech and reciprocal criticism of candidates for elected judicial office is in plentiful abundance. See, e.g., 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 156, at 49-50.

¹⁷¹ See Margaret H. Marshall, *Dangerous Talk, Dangerous Silence: Free Speech, Judicial Independence, and the Rule of Law*, 24 SYDNEY L. REV. 455 (2002).

¹⁷² 314 U.S. 252 (1941).

vote on, 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.¹⁷³

Though it surely is true that criticism of the judiciary did not suddenly rear its head in the last twenty years, the advent of technologies that carry critical commentary with increasing speed is a phenomenon of the later half of the twentieth century. "More information technology offers not only more speech but more ways to deliver that speech."¹⁷⁴ 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.¹⁷⁵ 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;¹⁷⁶ and the result has been, at one and the same moment, a general coarsening¹⁷⁷ and exponential intensification of, respectively, the quality and quantity of judicial criticism.

¹⁷³ Marshall, *supra* note 171, at 458.

¹⁷⁴ Garry, *supra* note 169, at 187; *see also* Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, (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").

¹⁷⁵ Garry, *supra* note 169, at 194.

¹⁷⁶ *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."

¹⁷⁷ 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.

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 surely many others that aim to curtail judicial powers) purportedly are rooted in the public's suspicion toward and resentment against the judiciary.¹⁷⁸ In fact, the terrain of public opinion has never been more fertile for the congressional power-plays exemplified by legislation such as the Feeney Amendment and Resolution 568. It is the popularity and profusion of judicial criticism, peaking, as it has, relatively recently, that 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' deployment of threat theory against judges. More than the advancement of any particular set of beliefs ("conservative" or "liberal"), it is the combination of widespread, public criticism and the legislative will to control the judiciary by stripping away and absorbing traditionally judicial functions that motivates Congress' threats of removal against judges – itself an acute form of judicial criticism.

¹⁷⁸ See Sensenbrenner Remarks Before the U.S. Judicial Conference Regarding Congressional Oversight Responsibility of the Judiciary, 150 Cong. Rec. E425-03 (Mar. 23, 2004) (Congressman Sensenbrenner states that the Feeney Amendment "represents a legislative response to a long-standing congressional concern that the Sentencing Guidelines were increasingly being circumvented by some federal judges," and emphasizes Congress' oversight responsibilities as the rightful duty of the "elected representatives of the people"); *Hearing on H.R. Res. 568 Before the Subcomm. on the Constitution*, 108th Cong. 112 (Mar. 25, 2004), 2004 WL 598895 (Congressman King roots the impetus for Resolution 568 in the public's disaffection with the judiciary by asking: "If we are going to go down the path of . . . judicial activism, that sees the future of America in a way 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?").

It is at this juncture that one might well ask what can be done to improve matters.¹⁷⁹

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.¹⁸⁰ With apologies to deliberative democracy enthusiasts,¹⁸¹ I am skeptical of this claim. Advocates of this type of

¹⁷⁹ Another question, "Should congressional threats of removal against the judiciary be of any concern?", is also worth considering. However, since the aim of this article is to establish that such threats are increasing in prevalence and that the state of relations between Congress and the judiciary will continue to deteriorate as a result, that question will not be addressed here.

¹⁸⁰ 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 the justice system insiders to take a much more aggressive role in the area of public education and public relations. 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, 14 (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 "gathering 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 Congress . . . Try to help them understand the needs of judges. It's much harder to turn a cold shoulder on someone you know." See *supra* note 2.

¹⁸¹ Much has been written about the role that public deliberation and debate plays (or should play) in the democratic process. See, e.g., Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, in PHILOSOPHY AND DEMOCRACY 17, 21 (Thomas Christiano ed. 2003): "The deliberative conception of democracy is centered 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 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 responsibility and accountability of political power to it . . ."; RICHARD A. POSNER, LAW, PRAGMATISM AND DEMOCRACY, ch. 4 (2003). Judge Posner identifies and examines two democratic models: "Concept I Democracy" is 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 143-145.

public education are grossly oversimplifying matters. There are parallels with other social institutions and professions (medicine, the law, government, education, business, etc.) that make this plain. I and surely many others recognize that 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.¹⁸² The public, after all, has many other valuable pursuits to occupy its time (earning a living and consuming goods (thereby contributing to the health of the economy), raising and educating children, enjoying well-earned leisure moments, and so on).¹⁸³ 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

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.

¹⁸² 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 181, 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.

¹⁸³ *See* Richard Posner, *Smooth Sailing: Democracy Doesn’t Need Deliberation Day. If Spending a Day Talking About Issues Were a Worthwhile Activity, You Wouldn’t Have to Pay Voters to Do It*, 2004-FEB LEGAL AFF. 41, 42 (2004): “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 people have for their other pursuits – personal, familial, and commercial.”

of medicine) is entirely inconsistent with “career imperatives and the tugs of self-interest.”¹⁸⁴

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.¹⁸⁵

“More speech” – that is, a continuation and/or increase in the quantity of judicial criticism – say others.¹⁸⁶ 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

¹⁸⁴ POSNER, *supra* note 181, at 140.

¹⁸⁵ See Somin, *supra* note 156: “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 181, 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.

¹⁸⁶ See Bogus, *supra* note 146, 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 (Holmes, J., dissenting) (using the marketplace of ideas metaphor that has become the cornerstone of freedom of speech doctrine); *Bridges*, 314 U.S. at 289 (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 (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): “Free speech demands that the

of critical dialogue (polylogue is more accurate).¹⁸⁷ There is undeniable intrinsic value in discussion and the exchange of views in arriving at practical solutions to local problems of limited scope.¹⁸⁸ 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 that speech, in whatever form and to whatever degree, is either harmless or always to the good.¹⁸⁹ Just the reverse is true. The enormous increase in speech (through, for example, the medium of Internet web sites and chat rooms) has only served to balkanize and polarize positions, as individuals can access with facility viewpoints that move them toward “extreme points in line with their initial tendencies.”¹⁹⁰ 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.¹⁹¹ Already the irritant of overabundant criticism has only exacerbated 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”

¹⁸⁷ See, e.g., Hon. Stephen J. Fortunato, *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 to a few populists with challengeable methodologies or debatable agendas”).

¹⁸⁸ See POSNER, *supra* note 181, at 137.

¹⁸⁹ See White, *supra* note 154, at 813.

¹⁹⁰ 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.”

¹⁹¹ 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

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 First Amendment basking in the fullness of its strength as one of the holiest of constitutional holies¹⁹² – to argue that limiting or stifling

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). One of the reasons for prohibiting judicial speech lies in the corrosive effect of such speech to the judiciary’s perceived legitimacy.

¹⁹² LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREE SPEECH AND EXTREMIST SPEECH IN AMERICA* 7 (1986) (observing that the concept of free speech is one of our “foremost cultural symbols”); White, *supra* note 154, at 811. 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 to reflect on you 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 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 This is the position we instinctively resort to when someone challenges the idea that speech should be free.

criticism of the judiciary is the answer.¹⁹³ We arrive, then, at an impasse. More judicial criticism (that is, the status quo) will not improve judicial/legislative relations; an imposed system of prior restraints against judicial criticism would be both politically 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.

¹⁹³ Justice Brandeis’ 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. at 377.