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Judicial Independence, Judicial Responsibility: A District Judge's Perspective

Joan Humphrey Lefkow*

As many of you are aware, two-and-a-half years ago I was unexpectedly and unwillingly vaulted into the public eye when tragedy struck my family and me. On February 28, 2005, a pro se litigant broke into my home in the middle of the night and lay in wait with a plan to kill me because I had dismissed his case. I will not elaborate, but suffice it to say, the cruel hand of Fate passed over me and took the lives of my husband and my aged mother, who was visiting in our home. By this inexplicable chain of events, I am here today to speak with you. As you can readily imagine, this has been a cataclysm in my life and in those of my children that one could never overestimate. I speak of it now only because it was the launch from which I began to think about judicial independence.

After the funerals, my youngest daughter and I remained in seclusion under the protection of the United States Marshals Service for a number of weeks. One of the things I did from time to time to distract myself during those days was turn on the television. The biggest story during March of 2005 was another family's tragedy, that of Theresa Schiavo, who according to news accounts had been in a persistent vegetative state for fifteen years.¹ The privacy one would hope for in such a situation was lost to an appalling feeding frenzy in which all the news channels and their pundits weighed in on either side of a bitter legal battle between those who claimed to love her most. The dispute that brought the parties to court was whether Schiavo, had she been able, would have chosen death over life in her circumstances.² Merely to state the issue illustrates the paradox it presented.

* Judge, United States District Court for the Northern District of Illinois. This text was delivered as the annual John Randolph Tucker Lecture at the Washington and Lee School of Law in October 2007.

1. Abby Goodnough & Carl Hulse, *Despite Congress, Woman's Feeding Tube is Removed*, N.Y. TIMES, Mar. 19, 2005, at A1.

2. *See id.* (describing how Ms. Schiavo had left no instructions on whether she would want to be reliant on feeding tubes to survive).

The Florida courts ruled in favor of her appointed guardian, her husband, who after ten years had petitioned the court for an order that a feeding tube that kept his wife alive be removed.³ The opinion of Judge Chris Altenbernd of the Florida Appellate Court is nothing if not respectful of the parties to the case and the heartrending situation the family had endured.⁴ And I should imagine that most of us lawyers who followed the case, whether closely or out of one ear, assumed that the Florida courts were where the case belonged.

Nevertheless, as happened with the pro se litigant in my personal situation, the losing party, the parents of Ms. Schiavo, headed to federal court as the court of last resort.⁵ But because of the doctrines the courts have developed to deal with the dual jurisdictional structure we have in the United States, there was little hope that a federal court lawsuit seeking to override the Florida court's judgment could get past the front door. Responding to the publicity and outcry from interest groups, on March 21, 2005, Congress set those obstacles aside, passing a law granting to the United States District Court for the Middle District of Florida jurisdiction to hear and determine any federal claim filed by or on behalf of Theresa Marie Schiavo relating to the withholding or withdrawal of nutrition or treatment necessary to sustain her life.⁶ The door to federal court opened.

Schiavo's parents relied on the constitutional right to substantive due process, the Fourteenth Amendment, the Eighth Amendment, and some

3. See *In re* Guardianship of Schiavo, No. 90-2908GD-003, 2000 WL 34546715, at *7 (Fla. Cir. Ct. Feb. 11, 2000) ("[T]he Petition for Authorization to Discontinue Artificial Life Support of Michael Schiavo, Guardian of the Person of Theresa Marie Schiavo . . . is hereby granted . . ."), *aff'd*, 780 So. 2d 176, 180 (Fla. Dist. Ct. App. 2001).

4. *Schiavo*, 780 So. 2d at 177–78. For example, the court stated:

Many patients in this condition would have been abandoned by friends and family within the first year. Michael has continued to care for her and to visit her all these years. He has never divorced her. He has become a professional respiratory therapist and works in a nearby hospital. As a guardian, he has always attempted to provide optimum treatment for his wife.

. . . .

Theresa's parents have continued to love her and visit her often. No one questions the sincerity of their prayers for the divine miracle that now is Theresa's only hope to regain any level of normal existence. No one questions that they have filed this appeal out of love for their daughter.

Id.

5. See *Schiavo ex. rel Schiavo v. Greer*, No. 8:05-CV-522-T-30TGW, 2005 WL 754121, at *2 (M.D. Fla. Mar. 18, 2005) (denying petitioners' Emergency Petition for Temporary Injunction and Petition for Writ of Habeas Corpus), *vacated*, 2005 WL 2240351, at *1 (M.D. Fla. Mar. 21, 2005).

6. An Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15 (2005).

statutory claims.⁷ On March 22, the district court denied a motion for a temporary restraining order because it found that the plaintiffs could not demonstrate the likelihood of success on the merits of any of their federal claims.⁸ Schiavo's parents appealed, and the Eleventh Circuit affirmed on March 23.⁹ Petitions for rehearing were denied, and the Supreme Court of the United States denied a stay on March 24.¹⁰

The heartbreaking divide within the Schiavo family became a symbol for the divide within American society over what is characterized as either the right to life or the right to choose, depending on one's point of view.¹¹ It became a political drama of outsized proportions. Although the rulings of the federal courts were paradigms of judicial restraint, many intemperate things were said about so-called activist judges. One senator made the following statement from the floor on April 4, 2005: "I wonder whether there may be some connection between the perception in some quarters on some occasions where judges are making political decisions yet are unaccountable to the public, that it builds up and builds up and builds up to the point where some people engage in, engage in violence."¹²

Let me pause a moment to state that I took Senator Cornyn's remarks personally, as I was certainly entitled to do based on his timing, as was the family of Judge Rowland Barnes of Atlanta, who was murdered by a criminal defendant in his own courtroom less than one month earlier.¹³

On May 18, 2005, I testified before the Senate Judiciary Committee concerning judicial security.¹⁴ I called on the committee members and other elected leaders to "publicly and persistently repudiate gratuitous attacks on the judiciary."¹⁵ At the time, I was referring to the senator's and other lawmakers'

7. Schiavo *ex rel.* Schindler v. Schiavo, 357 F. Supp. 2d 1378, 1384 (M.D. Fla. 2005).

8. *Id.* at 1388.

9. Schiavo *ex rel.* Schindler v. Schiavo, 403 F.3d 1223, 1237 (11th Cir. 2005).

10. Schiavo *ex rel.* Schindler v. Schiavo, 544 U.S. 945, 945 (2005).

11. See, e.g., Shaila Dewan et al., *States Taking a New Look at End-of-Life Legislation*, N.Y. TIMES, Mar. 31, 2005, at A14 (discussing the debate over end-of-life decisions that arose as a result of the Theresa Schiavo case).

12. Charles Babington, *Senator Links Violence to "Political" Decisions*, WASH. POST, Apr. 5, 2005, at A7.

13. See Manuel Roig-Franzia & Melanie Lasoff Levs, *Three Slain in Atlanta Courthouse Rampage*, WASH. POST, Mar. 12, 2005, at A1 (detailing the courthouse shooting in which Judge Barnes died).

14. *Protecting the Judiciary at Home and in the Courthouse: Hearings Before the S. Comm. on the Judiciary*, 109th Cong. 6-13 (2005) [hereinafter *Protecting the Judiciary*] (statement of Joan H. Lefkow, United States District J.).

15. *Id.* at 10.

verbal attacks on judges and also to the outsized statements of people like television evangelist Pat Robertson, who on May 1, 2005, opined that federal judges pose a threat "probably more serious than a few bearded terrorists who fly into buildings."¹⁶ I said at that time:

It seems to me that even though we cannot prove a cause and effect relationship between rhetorical attacks on judges and violent acts of vengeance by a particular litigant, fostering disrespect for judges can only encourage those that are on the edge, or the fringe, to exact revenge on a judge who ruled against them.¹⁷

Since those awful days, I have tuned in to the anti-judge, anti-court clatter and have found it to be more pervasive than I had expected. Although much of what was broadcast on television and on the Internet was dismissible as commercial demagoguery, when words such as "punishing" judges,¹⁸ "mass impeachment" of judges,¹⁹ and getting judges "in line"²⁰ by drying up the judiciary's budget started to come from elected leaders, responsible members of the bench and bar were legitimately alarmed.

That summer, Tom DeLay, the House Majority Leader, gave a speech to more than 3,000 evangelicals gathered for Justice Sunday in Nashville in anticipation of the confirmation hearings for Chief Justice John Roberts.²¹ He accused the Supreme Court of overstepping its lawful authority by making law rather than interpreting law, adding his voice to the likes of James Dobson, the political activist/child psychologist, who stated: "Almost all of the great moral and social issues of our time are decided not by the voters but by an unelected, unaccountable and often arrogant judiciary. We call that effort judicial tyranny."²²

Now, thanks principally to the federal courts, Mr. Robertson (who is, I understand, a graduate of this university) and Dr. Dobson have a right to say

16. Interview by George Stephanopoulos with Reverend Pat Robertson, Chairman, Christian Broad. Network, on *ABC News* (ABC television broadcast May 2005), available at <http://www.patrobertson.com/PressReleases/thisweekgs.asp> (last visited Feb. 27, 2008) (on file with the Washington and Lee Law Review).

17. *Protecting the Judiciary*, *supra* note 14, at 12.

18. The Honorable James Sensenbrenner, Jr., Chairman, House Judiciary Comm., Zale Lecture in Public Policy at Stanford University (May 9, 2005), available at <http://judiciary.house.gov/media/pdfs/stanfordjudgesspeechpressversion505.pdf>.

19. Ruth Marcus, *Booting the Bench*, WASH. POST, Apr. 11, 2005, at A19.

20. *Id.*

21. Kathy Lohr, *Christian Telecast Educates Faithful on High Court* (NPR radio broadcast Aug. 15, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=4800037> (last visited Feb. 27, 2008).

22. *Id.*

what they think, even irresponsible things. I felt when I testified, however, and I feel today, that a public official is in a different category. We should expect restraint from a person who commands the respect of the office of senator or congressman. Likewise, I hope that members, and future members, of the bar, including those who are here today, will do their part not to let such statements go unchallenged.

After her retirement from the United States Supreme Court, Justice Sandra Day O'Connor began to speak publicly of her concern about what she characterized as threats to judicial independence. As reported on National Public Radio, during a speech at Georgetown University Law Center on March 6, 2006, she said, "It doesn't help . . . when a high-profile senator suggests there may be a connection between violence against judges and decisions that the senator disagrees with."²³ According to the report:

"I," said O'Connor, "am against judicial reforms driven by nakedly partisan reasoning." Pointing to the experiences of developing countries and former communist countries, where interference with an independent judiciary has allowed dictatorship to flourish, O'Connor said, "We must be ever-vigilant against those who would strong-arm the judiciary into adopting their preferred policies. It takes a lot of degeneration before a country falls into dictatorship, but we should avoid these ends by avoiding these beginnings."²⁴

The Justice O'Connor speech led to the formation of the Sandra Day O'Connor Project on the State of the Judiciary at Georgetown University Law Center.²⁵ A conference was held during September 2006, where many highly respected and knowledgeable participants engaged in a discussion of whether and to what extent the independence of the judiciary in America is under siege.²⁶

23. Nina Totenberg, *Morning Edition: O'Connor Decries Republican Attacks on Courts* (NPR radio broadcast Mar. 10, 2006), available at <http://npr.org/templates/story/story.php?storyID=5255712> (last visited Feb. 27, 2008).

24. *Id.*

25. See Press Release, Georgetown University Law Center, Georgetown Law Establishes Sandra Day O'Connor Project on State of the Judiciary (Feb. 12, 2007), available at <http://www.law.georgetown.edu/news/releases/February.13.2007.html> (last visited Feb. 27, 2008) (announcing the establishment of the Sandra Day O'Connor Project on the State of the Judiciary) (on file with the Washington and Lee Law Review).

26. See generally Panel Remarks, *Judicial Independence: Justifications and Modern Criticisms*, at the Georgetown University Law Center and American Law Institute Conference on Fair and Independent Courts: A Conference on the State of the Judiciary (Sept. 28, 2006) (transcript available at <http://www.law.georgetown.edu/news/documents/COJ092806-panel1.pdf>). The panelists were: C. Boyden Gray, United States Ambassador to the European Union; Jack N. Rakove, Professor of History and Political Science at Stanford University; Kathleen M.

On March 19, 2007, in a speech given at the University of Virginia School of Law, William H. Pryor, Jr., a judge of the Federal Court of Appeals for the Eleventh Circuit who took the bench in 2004, emphatically diminished the efforts of Justice O'Connor.²⁷ Stating that "talk of judicial independence is all the rage," he took the position that judicial independence is alive and well.²⁸

Judge Pryor argued from history, citing three important occasions when the independence of the judiciary was under attack.²⁹ In short, the first crisis of judicial independence, he said, was when newly elected President Thomas Jefferson refused to deliver the commissions for new judgeships created under the Judiciary Act of 1801, giving rise to *Marbury v. Madison*,³⁰ the seminal case credited with establishing the doctrine of judicial review.³¹ The second was during Reconstruction when the Republican Congress repealed the Court's appellate jurisdiction in response to the *Dred Scott*³² decision.³³ The third was the infamous court-packing scheme initiated by President Roosevelt.³⁴ In each instance, Judge Pryor argued that the Supreme Court acted with restraint, and through a fortuitous confluence of events, Congress acted or refrained from acting such that the Court's independence was not compromised.³⁵ Although there is no provable cause and effect, Judge Pryor conceded, he observed that after each of these crises, by exercising restraint, the Court enjoyed greater deference as an independent branch of government.³⁶ As he saw it, the "tested method of defending our independence" is "to respect the limits of our authority."³⁷

Sullivan, Professor and Director of the Stanford Constitutional Law Center; and Pierre Thomas, ABC News Justice Correspondent.

27. See Emily Williams, *Judicial Independence Safe, Pryor Says*, Mar. 23, 2007, available at http://www.law.virginia.edu/html/news/2007_spr/pryor.htm (last visited Feb. 28, 2008) (reporting that Judge Pryor believes that Justice O'Connor is "pointing out problems that are non-issues") (on file with the Washington and Lee Law Review).

28. William H. Pryor, Jr., Essay, *Not-So-Serious Threats to Judicial Independence*, 93 VA. L. REV. 1759, 1759 (2007).

29. See *id.* at 1767-74 (discussing the "Jeffersonian Challenge," the "Reconstruction Challenge," and the "New Deal Challenge").

30. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

31. Pryor, *supra* note 28, at 1767-70.

32. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

33. Pryor, *supra* note 28, at 1771.

34. *Id.* at 1772.

35. *Id.* at 1773.

36. See *id.* at 1762-63 ("I submit that the independence of the federal judiciary today is as secure as ever.")

37. *Id.* at 1763.

By comparison, Judge Pryor asserted, "contemporary challenges are not serious."³⁸ He acknowledged a rather long list of efforts to "rein in" the judiciary.³⁹ One of the most dramatic was an initiative to amend the constitution of South Dakota to repeal judicial immunity, popularly known as "J.A.I.L. 4 Judges."⁴⁰ That failed,⁴¹ as did bills in Congress that would have forbidden the federal courts from relying on foreign law.⁴² Some other unsuccessful initiatives that Judge Pryor mentioned were bills to create an inspector general for the judiciary,⁴³ threats of budget cuts, and efforts to remove the courts' jurisdiction to hear certain matters. He dismissed stagnation of judicial compensation and threats of, and violence against, judges as unfortunate but not serious threats to judicial independence and insisted that the current assaults on the judiciary are appropriate and necessary to thriving public discourse and, fundamentally, to democracy.⁴⁴ Verbal attacks are, after all, not defiance. Pitched battles over appointments are (1) child's play compared to running for office and (2) appropriate because a great deal is at stake. One gets the sense that Judge Pryor believes that if the courts simply wait it out, the legislatures will end up doing the right thing, so all's right with the judiciary, if not the whole world.

Is the talk of threats to judicial independence much ado about nothing? "Crisis" is a dramatic term. Certainly, the furor around the *Schiavo* case and the political fallout that caused Justice O'Connor's alarm have subsided, and some of the anti-court initiatives have died or been put aside, primarily because

38. *Id.* at 1764.

39. *Id.* at 1774.

40. *Id.* at 1779.

41. See S.D. Sec'y of State, General Election Official Returns for Ballot Questions (2006), http://www.sdsos.gov/electionsvoteregistration/pastelections_electioninfo06_GEBallotquestions.shtml (last visited Feb. 27, 2008) (showing the official voting results for ballot questions) (on file with the Washington and Lee Law Review).

42. Constitution Restoration Act of 2005, S. 520, 109th Cong. (2005); H.R. 1070, 109th Cong. (2005). The Constitution Restoration Act would have prohibited the courts, in interpreting the Constitution, from relying on any foreign sources of law other than English constitutional and common law up to the time of the adoption of the Constitution. S. 520 § 201; H.R. 1070 § 201.

43. Pryor, *supra* note 28, at 1760–61. For one example of such a legislative attempt, see The Judicial Transparency and Ethics Enhancement Act of 2006, H.R. 5219, 109th Cong. (2005). Introduced by Congressman James Sensenbrenner, this bill proposed oversight of the judiciary by creating an Office of the Inspector General to investigate "possible misconduct in office of judges," "prevent and detect waste, fraud, and abuse," and "recommend changes in laws or regulations governing the Judicial Branch." H.R. 5219 § 2. For the Senate counterpart, introduced by Senator Charles Grassley, see S. 2678, 109th Cong. (2005).

44. Pryor, *supra* note 28, at 1763.

of the changing tides of American politics, especially the 2006 election and recent Supreme Court appointments.

To move forward in the discussion of judicial independence, we first need to address the increasing confusion of what the term really means. Michael Traynor, President of the American Law Institute, stated at the 2006 Georgetown conference:

The term judicial independence is widely misunderstood. To some, independence connotes inappropriate activism, requests to create law unbound by the constraints of statutes or common law preceden[ts]. For many thoughtful people, it is an "I know it when I see it" kind of term. Like the elusive phrase "sustainable development" in environmental discussions, it reflects values that are important to the people who hold them, even though they may not agree about details.⁴⁵

To lawyers, judicial independence is something quite distinct from that: It is the notion that, in order for judges to exercise their office without fear or favor, they have to be protected from adverse consequences for making an unpopular decision. Naturally, the legislatures are going to enact laws in response to their constituencies, but the courts are to be a restraint on the excesses of the legislature.⁴⁶

At its heart, America understands this. The great journalist Edward R. Murrow, who is best known for his role in bringing down the excesses of anti-

45. John J. Degioia, President, Georgetown Univ., Remarks at the Georgetown University Law Center and American Law Institute Conference on Fair and Independent Courts: A Conference on the State of the Judiciary 4 (Sept. 28, 2006) (transcript available at <http://www.law.georgetown.edu/news/documents/CoJ092806-degioia.pdf>).

46. In the words of Jack N. Rakove, who spoke at the Conference on the State of the Judiciary:

[T]he concept of judicial independence . . . emerges as a kind of complement to the recognition, which . . . [James] Madison [was] originally the leading spokesman for, that legislatures . . . from 1776 on . . . [were] going to be the real locus of republican politics. And they're going to act impetuously, as Madison believe[d] they had acted during the revolution, enacting too many laws, too mutable laws, and potentially enacting unjust laws. And some further check needs to be provided against their excesses, against their dangers[,] than simply their election by the people.

So it's important to recognize that the idea of an independent judiciary emerges in opposition to—and in a sense, almost in conflict with—this recognition of the sway of legislative power. And the obvious inference to be drawn from that is that one would want to be careful, if that's your initial formulation of an independent judiciary, about reading the legislative mandate to regulate or oversee the judiciary too broadly. That would cut against the grain of this original impulse.

Jack N. Rakove, Professor of History and Political Sci. at Stanford Univ., Remarks at the Georgetown University Law Center and American Law Institute Conference on Fair and Independent Courts, *supra* note 26, at 4.

communist fervor most famously embodied in Wisconsin's Senator Joe McCarthy, said: "The only thing that counts is the right to know, to speak, to think—that, and the sanctity of the courts. Otherwise it's not America."⁴⁷

"Sanctity," according to *Webster's Dictionary*, means "the quality or state of being holy or sacred."⁴⁸ Sacred is a thought-provoking word. The late philosopher Mortimer Adler, in *We Hold These Truths*, identified judicial review (the reason judicial independence matters) as the "legal remedy for the tyranny of the majority in the operation of constitutional government."⁴⁹ He states:

The remedy that preserves the principle of majority rule while at the same time nullifying unjust laws approved by a legislative majority was found by our ancestors in the power of the Supreme Court to review the acts of government, executive as well as legislative, and to declare them unconstitutional and, therefore, null and void.⁵⁰

Think of cases such as *Schwartz v. Board of Bar Examiners of New Mexico*,⁵¹ where the inestimable Justice Black announced that a bar applicant's long past membership in the Communist Party, prior arrests (that did not result in trials or convictions), and the past use of aliases did not raise substantial doubts as to the applicant's good moral character; thus, to deny him the opportunity to take the bar exam was a denial of due process.⁵² The image this case evokes of the federal court staying the hand of popular will to vindicate the right of freedom of association is one that is, by now, deeply engraved in the American consciousness.

Lest those of us who labor in the district courts be overlooked, I commend to all Jack Bass's marvelous book, *Unlikely Heroes*, described on the cover as "[a] vivid account of the implementation of the *Brown* decision in the South by southern federal judges committed to the rule of law."⁵³ Consider the life of Judge Skelly Wright, who in his own heart came to grips with injustice during a Christmas Eve party for the United States Attorney's Office as he watched

47. Joseph Wershba, *Edward R. Morrow and the Time of His Time*, *EVE'S MAG.*, <http://www.evesmag.com/murrow.htm> (last visited Feb. 12, 2008) (on file with the Washington and Lee Law Review).

48. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2009 (2002).

49. MORTIMER J. ADLER, *WE HOLD THESE TRUTHS* 101 (1987).

50. *Id.*

51. See *Schwartz v. Bd. of Bar Examiners of N.M.*, 353 U.S. 232, 247 (1957) ("[W]e hold that the State of New Mexico deprived petitioner of due process in denying him the opportunity to qualify for the practice of law.").

52. *Id.* at 246–47.

53. JACK BASS, *UNLIKELY HEROES* (1981).

through a window the Lighthouse for the Blind across the street holding a segregated holiday party.⁵⁴ Eventually, he, through courageous adherence to the law, endured being "the most hated man in New Orleans" for ordering desegregation of the schools.⁵⁵ Again, few nowadays would deny the justness or rightness of Judge Wright's rulings. No matter the public outrage at the time, these judges were not removed from office; their pay was not diminished; they were not impeached.

I agree with Judge Pryor (as does Justice O'Connor, I am confident) that where federal judges are concerned, we are independent in our decisionmaking. As individual judges, we are not subject to official retribution for ruling as we believe the law commands. So long as security concerns are attended to, I agree with Judge Pryor (as does Justice O'Connor) that the public must be free to rant and rave about judicial decisions if they want to. Some of that ranting is fully justified because judges do sometimes get carried away with their own importance. Judges do, no matter how conscientious, make bad decisions from time to time. I agree that federal judicial appointments are sufficiently important that they deserve thorough debate. I agree that judges typically act with restraint to avoid confrontations with the legislature and the President over boundaries. And I agree that "judicial restraint" is—on the whole—good for America, as are legislative restraint and executive restraint in those branches' relations with each other and with the judiciary.

On the other hand, I submit that Judge Pryor unjustifiably minimizes some troubling signs for our independent judiciary. First is the issue of jurisdiction stripping. By jurisdiction stripping, I mean legislation that deprives the federal courts of the power to hear certain categories of cases, so as to deny federal courts the power to interpret constitutional law. As I read the newspapers and some of the academic literature—and believe me, I am neither an intellectual, nor an academic, nor do I spend my time researching this—it strikes me that jurisdiction stripping is important because it is a form of collective, or institutional, retribution that is erosive of the judicial branch of government.

According to a document dated September 28, 2004, under the heading United States Senate, Republican Policy Committee and titled *The Case for Jurisdiction-Stripping Legislation: Restoring Popular Control of the Constitution*, the proposition is laid down that "[t]he American people must have a remedy when they believe that federal courts have overreached and

54. *Id.* at 112.

55. *Id.* at 112–35.

interpreted the Constitution in ways that are fundamentally at odds with the people's common constitutional understandings and expectations."⁵⁶ The remedy proposed is "to eliminate the jurisdiction of the federal courts over particular issues."⁵⁷ According to this paper, more than fifty such bills have been introduced since the mid-1970s relating to voluntary prayer in public buildings, abortion, religious liberty, and the protection of traditional marriage.⁵⁸ The proposal mentioned above—that would have prohibited the courts in interpreting the Constitution from relying on any foreign sources of law except English constitutional and common law up to the time of the adoption of the Constitution—also would have stripped the federal courts of jurisdiction to hear cases seeking relief in relation to a governmental actor's "acknowledgment of God as the sovereign source of law, liberty, or government."⁵⁹ Furthermore, if a judge were to exceed these jurisdictional limitations, the bill provided that such activity would be an impeachable offense and a breach of the standard of good behavior.⁶⁰

As Judge Pryor said in his speech, it's much easier to propose legislation than to get it passed.⁶¹ The majority of the members of Congress, in both parties, respects what the courts do and is loath to tamper with the Third Branch. These initiatives have receded from view for the present, at least. On the other hand, over the past couple of decades a considerable amount of jurisdiction-stripping legislation has been passed that has reduced the power

56. SENATE REPUBLICAN POLICY COMM., 108TH CONG., THE CASE FOR JURISDICTION-STRIPPING LEGISLATION: RESTORING POPULAR CONTROL OF THE CONSTITUTION 1 (2004), available at http://www.rpc.senate.gov/_files/Sept2804CourtStrippingSD.pdf (last visited Mar. 4, 2008).

57. *Id.* at 5.

58. *Id.* at 8. As an example, a House bill introduced during the 109th Congress in 2005 would have stripped the federal courts of their jurisdiction (including Supreme Court appellate jurisdiction) to hear cases relating to the Pledge of Allegiance. Pledge Protection Act of 2005, H.R. 2389, 109th Cong. (2005); see also Protect the Pledge Act of 2003, S. 1297, 108th Cong. (2003) (proposing substantially the same measure). Another bill would have prohibited any court from hearing or deciding any question pertaining to the interpretation or validity of the Defense of Marriage Act, 28 U.S.C. § 1738C (2000). Marriage Protection Act of 2005, H.R. 1100, 109th Cong. § 2 (2005).

59. Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. § 101(a)(1) (2004).

60. See *id.* § 302 (discussing judicial penalties). The bill specifically states:

To the extent that a justice of the Supreme Court of the United States or any judge of any Federal court engages in any activity that exceeds the jurisdiction of the court of that justice or judge, . . . engaging in that activity shall be deemed to constitute the commission of . . . an offense for which the judge may be removed upon impeachment and conviction.

Id.

61. Pryor, *supra* note 28, at 1779.

of federal courts, in areas such as criminal sentencing,⁶² speedy trials,⁶³ the circumstances in which the writ of habeas corpus may be granted,⁶⁴ administrative actions in immigration proceedings,⁶⁵ and prison reform.⁶⁶ Congress last year shifted from the federal courts to the Attorney General the determination of whether a state has established a mechanism for providing for competent counsel to indigents in post-conviction proceedings in capital cases.⁶⁷

At the top of the news is the Military Commissions Act of 2006.⁶⁸ Broadly stated, this law denies to persons the President designates as "enemy combatants" access to federal courts to challenge their detention.⁶⁹ It is being challenged in *Boumediene v. Bush*.⁷⁰ The question as framed by the D.C. Circuit was: "Do federal courts have jurisdiction over petitions for writs of habeas corpus filed by aliens captured abroad and detained as enemy combatants at the Guantanamo Bay Naval Base in Cuba?"⁷¹ The court answered the question "no," holding that the Military Commissions Act, in depriving the federal courts of jurisdiction over the detainees' habeas petitions, does not violate the Suspension Clause of the Constitution.⁷² The Supreme Court granted certiorari, and oral argument was held on December 5, 2007.⁷³ It

62. See, e.g., 18 U.S.C. § 3553 (2000) (establishing guidelines for courts to consider when determining criminal sentences), *invalidated in part by United States v. Booker*, 543 U.S. 220 (2005).

63. Speedy Trial Act, 18 U.S.C. §§ 3161–3174.

64. See, e.g., 28 U.S.C. § 2241(e) (2000) (preventing federal courts from granting writs of habeas in enemy combatant cases).

65. The Illegal Immigration Reform and Immigrant Responsibility Act dramatically restricted federal judicial review for death row inmates and for many immigrants facing deportation. Pub. L. No. 104-208, § 306, 110 Stat. 3009, 3009-607 to -612 (1996) (codified as amended at 8 U.S.C. § 1252 (2000)).

66. Prison Litigation Reform Act, Pub. L. No. 104-134, § 803, 110 Stat. 1321, 1321-71 to -72 (1996) (codified as amended at 42 U.S.C. § 1997e (2000)).

67. See USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 507, 120 Stat. 192, 250 (2006) (codified as amended at 28 U.S.C. §§ 2261, 2265) (authorizing Attorney General review of the state mechanisms for providing counsel).

68. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10 U.S.C.).

69. *Id.* § 948a, 120 Stat. at 2601; *id.* § 948b, 120 Stat. at 2602.

70. *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (June 29, 2007).

71. *Id.* at 984.

72. See *id.* at 991–92 ("Precedent in this court and the Supreme Court holds that the Constitution does not confer rights on aliens without property or presence within the United States."). See generally U.S. CONST. art. I, § 9, cl. 2.

73. *Boumediene v. Bush*, 127 S. Ct. 3078 (2007).

will be very revealing to watch what happens in this case, in terms of how the Roberts Court will measure the balance between the executive and the courts. (I do not miss the point that the Court decides this issue in the end.) Whatever the wisdom of these laws as a policy matter, I do think they show it is not fair to say that jurisdiction-stripping is all talk and no action.

More broadly, there is a school of thought that would eliminate the lower federal courts' jurisdiction over classes of cases interpreting the constitution and rest that responsibility in the state courts.⁷⁴ Then, at the state level, the push is to make judges more "responsible to the electorate" by replacing appointive systems with judicial elections, cutting terms of appellate judges in Colorado,⁷⁵ and through the campaign lovingly branded as "J.A.I.L. 4 Judges" to eliminate judicial immunity and allow judges to be censured for their rulings.⁷⁶ Probably unrealistic. Yet, we judges and lawyers need to pay attention to these movements, as they say something important about change in the body politic. Ultimately, the consent of the governed is necessary for democratic institutions to survive. Here I quote an American Bar Association paper: "That is especially true of the judiciary, which controls neither the sword nor the purse and must depend on public acceptance for its continued existence as an independent branch of government."⁷⁷

74. The 2004 Senate Republican Policy Committee Report stated:

A bill to limit the jurisdiction of the federal courts could take two basic forms:

In one form, a jurisdiction-stripping statute could limit the jurisdiction of lower federal courts to hear a certain class of dispute, but leave untouched the appellate jurisdiction of the Supreme Court. In that circumstance, a litigant with a claim based on a federal statute or constitutional provision would bring his case in state court, and after exhausting all appeals in the state court system, seek review from the U.S. Supreme Court. This approach would prevent judges in the lower federal courts from announcing unpopular and unwise constitutional rulings that impact several states' citizens

The other option is to craft a statute that would abolish *both* lower court *and* Supreme Court jurisdiction over a particular issue or class of cases. Thus, the litigant would bring his claim to the state courts, and the final decision would rest with the highest court in that state to review the dispute

SENATE REPUBLICAN POLICY COMM., *supra* note 56, at 5–6.

75. According to Justice at Stake, who initiated these efforts: "Two sides combined to spend over \$2.5 million on this citizen ballot initiative . . ." JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2006, at viii (2006), *available at* <http://justiceatstake.org/files/NewPoliticsofJudicialElections2006.pdf> (last visited Mar. 31, 2008). Constitutional Amendment 40 would have limited the number of terms appellate judges could serve, reduced their term lengths from ten to four years, mandated retirement of any appellate judge who had already served ten years, and required all others to stand for retention in November 2008. *Id.* at 50.

76. *Supra* notes 40–41 and accompanying text.

77. COMM'N ON THE 21ST CENTURY JUDICIARY, AM. BAR ASS'N, JUSTICE IN JEOPARDY 2 (2003) [hereinafter ABA REPORT], *available at* <http://www.abanet.org/judind/jeopardy/pdf/>

A thorough and thoughtful study of the state of the American judiciary done by the American Bar Association several years ago attributed skepticism about the courts to two trends: "a general decline of confidence in the major institutions of American society" and the "lessons of legal realism," which have filtered down from the legal community to the general public"⁷⁸ The study further noted, "[T]he secret is out Judges in the United States make law and the people in the United States know that."⁷⁹

I don't think it is fair to characterize what judges do as "making law," although ultimately, in the appellate courts and the Supreme Court, by interpreting the law as the Court understands it, and by being the last word on saying what the law is or means, that can amount to making law.

As for me, I decide cases. I deal with human beings. They may be aliens without documents or corporate executives. The parents of a seventh grader contend it is against their religious beliefs to allow their child to wear a school uniform.⁸⁰ They file a lawsuit under the First Amendment.⁸¹ A journalist believes the First Amendment means that he should be able to see the citizen complaint registers for police officers.⁸² A woman whose car is impounded by the police because her son was arrested for driving on a suspended license, even though she can lawfully drive the car, claims deprivation of due process.⁸³ We judges don't invite these cases. The people come to us. The courts are an incredibly democratic institution. The executive and the legislative branches by their nature deal with large groups and rules of broad application. But anyone can file a lawsuit and have their individual situation considered. That is grass roots democracy.

Despite the enormous contribution that universal access to justice makes to a civil society, when a decision grabs the attention of a particular interest group, often because it is exceptional (remember the hot coffee at

report.pdf (last visited Feb. 27, 2008).

78. *Id.* at 17 (quoting G. ALAN TARR ET AL., STATE HIGH COURTS IN STATE AND NATION 49 (1988)).

79. *Id.*

80. *See Levon v. O'Rourke*, No. 96-C-7304, 1996 U.S. Dist. LEXIS 19378, at *27 (N.D. Ill. Dec. 24, 1996) (denying a request for an injunction seeking to prevent a local school district from enforcing its school uniform policy against a seventh grade student).

81. *Id.* at *15.

82. *See Bond v. Utreras*, No. 04-C-2617, 2007 U.S. Dist. LEXIS 48914, at *15 (N.D. Ill. July 2, 2007) (granting a journalist's motion to unseal public documents relating to alleged police misconduct).

83. *See Harrington v. Heavey*, No. 04-C-5991, 2006 U.S. Dist. LEXIS 84964, at *18 (N.D. Ill. Nov. 16, 2006) (finding that the seizure of the vehicle violated the plaintiff's Fourth Amendment rights, without addressing the plaintiff's due process claim).

McDonald's),⁸⁴ press releases are cranked out and suddenly the media are "all over it," as our young people say.⁸⁵ The ability for information to flow instantaneously and the message to be molded to serve the goals of single-issue interest groups has led to something new and quite effective in contributing to the erosion of confidence that judges are ruling according to law rather than their personal beliefs.

Another factor, undoubtedly, is a disconnect between who our judges are (overwhelmingly white, non-Hispanic) and the steadily declining share of the population that we white, non-Hispanics comprise. According to one poll, 85% of African Americans believe that "there are two systems of justice—one for the rich and powerful, and one for everyone else."⁸⁶ Hispanics, likewise, have less confidence in the courts than white, non-Hispanics.⁸⁷ According to the National Center for State Courts, a majority of whites believe judges are fair and impartial, while a majority of African Americans (55%) believe they are not fair and impartial.⁸⁸ Apart from ethnicity, dramatic and rapid economic changes due to the global economy have left many people feeling insecure, afraid, and betrayed for the lost prosperity they expected based on the comfort of their parents' generation. As the ABA report put it: "To the extent that significant segments of the public think that judges are captured by special interests, controlled by the wealthy and powerful, and unconcerned about the rights of racial, ethnic, and political minorities, our system of justice is in very serious trouble."⁸⁹

It is a complex dynamic. One idea that seems counter, however, to what lawyers and judges on the whole accept is the idea that case outcomes ought to comport with what the electorate would prefer. On this note, I heartily agree with Justice O'Connor, that we have failed to properly educate our citizenry

84. See *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309, at *1 (N.M. Dist. Ct. Aug. 18, 1994) (announcing a jury verdict awarding the plaintiff \$160,000 in compensatory damages and \$2,700,000 in punitive damages for injuries received from spilled hot coffee).

85. See generally Andrea Gerlin, *A Matter of Degree: How a Jury Decided That a Coffee Spill Is Worth \$2.9 Million*, WALL ST. J., Sept. 1, 1994, at A1; *Hot Coffee Spill Worth Cool Award, McDonald's May Fork Over \$2.9 Million*, DENV. POST, Aug. 19, 1994, at A12; *Java Jive*, MIAMI HERALD, Aug. 27, 1994, at 30A; Rick Van Warner, Editorial, *The Legal Wheel of Fortune Is Spinning Out of Control*, NATION'S RESTAURANT NEWS, Sept. 12, 1994, at 47.

86. ABA REPORT, *supra* note 77, at 41.

87. See *id.* at 42 ("[W]hile 34 percent of non-Hispanic whites 'strongly agreed' that '[j]udges are generally honest and fair in deciding cases,' the percentage declined to 29 percent for Hispanics.").

88. *Id.*

89. *Id.*

about the role of the courts as a counterweight that can absorb minority views and respond by protecting their basic civil rights.

It is for us judges, particularly those of us who serve on the front lines of justice in the trial courts, to be continually aware of how our conduct affects the public so as to maintain and continually earn the confidence and respect of the public. I do not mean that we should waver from our allegiance to the rule of law or bend to popular opinion. But we can do things that make sure that people who appear before us, and the public that watches what we do, see that litigants are treated fairly and given voice through a full hearing. We can keep our own house in order so that the public does not pick up the phone to call for radical change, the kinds of "reforms driven by nakedly partisan reasoning" that caused Justice O'Connor's alarm.⁹⁰

Foremost is making sure that litigants and defendants see more people who look like them sitting up on the bench. Another arena is continued vigilance about judicial conduct. In this regard, the Judicial Conference of the United States has under consideration rules concerning judicial conduct and disability.⁹¹ This reform was put on the front burner after a couple of newspaper articles revealed that a small number of federal district and appellate judges had participated in cases in which they held a financial interest.⁹²

This is and always has been a clear and unambiguous no-no. All of the judges asserted that their violation was inadvertent. Certainly, since the information about the conflicts in those instances was derived from the judges' own financial disclosure filings,⁹³ no one could say the judge was hiding anything. Nonetheless, it was an embarrassment to the judiciary and certainly flagged a need for greater vigilance.

90. Totenberg, *supra* note 23.

91. The Judicial Conference Committee on Judicial Conduct and Disability issued their final recommendations in 2008. See generally JUDICIAL CONFERENCE COMM. ON JUDICIAL CONDUCT & DISABILITY, RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS (2008), available at <http://www.uscourts.gov/library/judicialmisconduct/Rules012308.pdf> (last visited Feb. 29, 2008). The proposed rules seek to establish "standards and procedures for addressing complaints filed by complainants or identified by chief judges, under the Judicial Conduct and Disability Act." *Id.* at 7.

92. See, e.g., Amelia Hansen, *Judge Denies He Had Financial Interest in Two Cases' Litigants*, DAILY J., Aug. 23, 2006, http://pda-appellateblog.blogspot.com/2006_08_01_archive.html (last visited Feb. 8, 2008) (describing newspaper articles about judges whose disclosed statements showed they had a financial interest in the litigants) (on file with Washington and Lee Law Review); Joe Stephens, *Ethics Lapses by Federal Judges Persist, Review Finds*, WASH. POST, Apr. 18, 2006, at A17 ("A number of federal judges have violated ethics rules in recent years by presiding over lawsuits while having a financial conflict.").

93. Stephens, *supra* note 92, at A17.

This backdrop, as well as the controversy I alluded to surrounding the *Schiavo* case, led the then-chairmen of the two Judiciary Committees in Congress to propose oversight of the judiciary by creation of an Office of the Inspector General to investigate "possible misconduct in office of judges."⁹⁴ Alongside this development, and in an effort to avoid confrontation with Congress over judicial independence that such a law might provoke, Chief Justice Rehnquist appointed a Committee, known as the Breyer Committee, to study courts' track records on self-policing and to make recommendations for improvement where needed.⁹⁵

The Breyer Committee reported that a total of about 700 complaints of misconduct are filed per year with the chief judges of all the circuits.⁹⁶ The overwhelming majority of them are prisoner complaints about a judge's ruling on the merits, but a few raise issues that fall under the topic of "conduct prejudicial to the . . . administration of the business of the courts."⁹⁷ Under existing law, the Judicial Conduct and Disability Act of 1980,⁹⁸ a somewhat complex procedure to address such complaints exists.⁹⁹ But the upshot of the Breyer Committee Report was a series of recommendations and the promulgation of rules governing judicial conduct and disability.¹⁰⁰ The initiative aims to upgrade information, advice, and assistance to the chief

94. Judicial Transparency and Ethics Enhancement Act of 2006, H.R. 5219, 109th Cong. § 1023 (2005); *see also* Judicial Transparency and Ethics Enhancement Act of 2006, S. 2678, 109th Cong. § 1023 (2005) (providing the Senate version of the bill).

95. *See* Arthur Hellman, *The Regulation of Judicial Ethics in the Federal System: A Peek Behind Closed Doors* 27 (University of Pittsburgh Sch. of Law Working Paper Series No. 57, 2007) ("In 2004, Chief Justice William H. Rehnquist appointed a committee chaired by Justice Stephen Breyer to assess how the Judicial Branch has administered the 1980 Act and whether there are any real problems in its implementation.").

96. *See* Judicial Conduct & Disability Act Study Comm., *Implementation of the Judicial Conduct and Disability Act of 1980, A Report to the Chief Justice*, 239 F.R.D. 116, 120 (2006) (explaining the committee's method of evaluation).

97. *See id.* at 129–32 (detailing the Act's major provisions).

98. 28 U.S.C. §§ 351–364 (2000).

99. *See* Judicial Conduct & Disability Act Study Comm., *supra* note 96, at 144–50 (explaining the judicial branch's analysis of complaints).

100. On March 11, 2008, the Judicial Conference of the United States approved these rules. Press Release, Admin. Office of the U.S. Courts, National Rules Adopted for Judicial Conduct and Disability Proceedings (Mar. 11, 2008), http://www.uscourts.gov/Press_Releases/2008/judicial_conf.cfm (last visited Mar. 17, 2008) (on file with the Washington and Lee Law Review). Unlike the illustrative rules they replace, "which since 1986 served as a prototype that could be modified and promulgated separately by an individual judicial council, the governing entity within each judicial circuit," these new rules, which take effect in April 2008, are binding. *Id.* *See generally* JUDICIAL CONFERENCE COMM. ON JUDICIAL CONDUCT & DISABILITY, *supra* note 91.

judges who analyze these complaints so they are well educated about their responsibilities under the Act and to educate judges on an ongoing basis about their ethical obligations.¹⁰¹ It will also let more sunshine in where the public is concerned so that the public can go to a court's website to find out how to lodge a complaint; can find out what the disposition was; and can appeal the disposition to a committee of the Judicial Conference of the United States if dissatisfied with the outcome.¹⁰²

The Breyer Committee made clear that the number of "problematic" dispositions was tiny, problematic "mean[ing] not that the complaint was meritorious, but that the handling of the complaint deviated from the Act's requirements; . . . for example, dismissals without adequate investigation or for the wrong reasons."¹⁰³ Nevertheless, the desire is to reduce the number of complaints to zero. Certainly, where perception is everything, we judges hope that this will allay concerns about ethical lapses within the federal judiciary.

Another area in which change in society has to be addressed is the matter of pro se litigation. As one contributor to the ABA report put it:

Americans pump their own gas, run businesses out of their homes, and thanks to the Internet, they do everything from diagnose their own [diseases] to record their own albums to sell anything imaginable that happens to be lying around the household. Why shouldn't they think they can represent themselves in court?¹⁰⁴

In my court, in 2006, 17% of our case filings were pro se. About half of those were prisoner cases and half were other people. Reports on state courts indicate about 35% are pro se filings. We have many pro se defendants as well, in addition to those who simply default because they have no idea what to do. These litigants either have claims (or defenses) that no lawyer would advocate, or they can't afford even the costs that a lawyer would demand, much less the fee.

Whether the claim is worthless, or valid, making sure that unrepresented people get a hearing is important to maintaining confidence in the courts. Clarence Gideon wrote his Supreme Court petition in pencil on prison

101. See Judicial Conduct & Disability Act Study Comm., *supra* note 96, at 209–17 (giving suggestions "aimed primarily at enhancing chief judges' and council members' ability to apply the Act").

102. See *id.* at 217–18 (giving recommendations to increase public knowledge).

103. *Id.* at 120–22.

104. ABA REPORT, *supra* note 77, at 2 (providing the testimony of David Tevelin, Director, State Justice Institute).

stationery, but he is the exception that proves the rule that pro se filers need help.¹⁰⁵

In the Northern District of Illinois, we have for many years had a trial bar. To be a member of the trial bar an attorney must accept an appointment to represent a person who cannot afford a lawyer where the judge believes the claims appear to have potential merit.¹⁰⁶ This has become an established tradition in which attorneys conscientiously devote their time on a pro bono basis. The Chicago Lawyers' Committee for Civil Rights Under Law and the Illinois Institute for Community Law have prepared handbooks to assist appointed counsel in the areas of prisoner litigation and employment discrimination. These handbooks are available on our court's website.¹⁰⁷ In order to recognize the noble work that the attorneys have done, each year the court, jointly with our local chapter of the Federal Bar Association (FBA), recognizes with awards some of the attorneys whose work has been particularly exemplary.

As for the other pro se litigants, for years our court dealt with these cases on an ad hoc basis, some judges being more attentive than others. Sometimes their complaints are indecipherable and sometimes not. Because the number of pro se filings has continued to grow, the court, with the cooperation of the FBA and the Legal Assistance Foundation of Metropolitan Chicago, has established a help desk in the clerk's office both in the district court and in the bankruptcy court. A pro se litigant can make an appointment to speak with a lawyer both to help assess the case and to guide the filer in preparing documents. This has been a marvelous help to the judges and I feel sure it increases consumer satisfaction with the court. I like to think that the help desk might be the safety valve that would prevent another tragedy like mine.

The final thought I have on keeping our own house in order brings me back to where I began. Because the *Schiavo* case garnered such publicity, it became the focus of both the state and the federal judiciary. It took, literally, an

105. See ANTHONY LEWIS, GIDEON'S TRUMPET 4 (1966) (providing a description of Gideon's petitions).

106. See N. DIST. ILL. LOCAL R. 83.11(g) ("Every member of the trial bar is to be available for appointment by the court to represent or assist in the representation of those who cannot afford to hire a member of the trial bar.").

107. See generally JAMES P. CHAPMAN ET AL., ILLINOIS INSTITUTE FOR COMMUNITY LAW, FEDERAL COURT PRISON LITIGATION PROJECT REVISED HANDBOOK, http://www.ilnd.uscourts.gov/LEGAL/Pr_litigation/pri00000.htm (last visited Mar. 3, 2008) (on file with the Washington and Lee Law Review); LAURIE WENDALL & MICHAEL K. FRIDKIN, THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, TITLE VII AND SECTION 1981: A GUIDE FOR APPOINTED ATTORNEYS IN THE NORTHERN DISTRICT OF ILLINOIS, <http://www.ilnd.uscourts.gov/ATTORNEY/2007Title7manual.pdf> (last visited Mar. 3, 2008).

act of Congress to open the door to the federal court to the parents of Theresa Schiavo.¹⁰⁸ Congress cannot, nor should it, do that for everyone who needs to be heard. Yet, I question whether, in the jurisprudence of judicial restraint, we have not closed the courthouse doors to too many people. I hope that we do not become an independent, but unresponsive judiciary.

Few cases go to trial. This means that judges, not juries, are deciding civil cases through the device of summary judgment. On the criminal side, the United States Attorney decides cases through the charging decision and plea negotiations. Judges impose sentences in a courtroom with no one present other than the lawyers and perhaps a few family members of the defendant. This means that citizens do not get exposure to the court system through jury service. It also means that the public is deprived of the very valuable collective judgment of the citizenry in the administration of justice.

We have many doctrines that keep people's cases from being heard on the merits: *Rooker-Feldman*,¹⁰⁹ standing, abstention, exhaustion of remedies, qualified immunity, the Eleventh Amendment, forfeiture rules, limitations of claims, caps on damages, and the like. One constitutional law professor wrote recently, "[F]ederal courts are often seen as hostile and uncommitted to our most prized national ideals of equality and justice under the law. They are frequently seen as institutions dedicated to protecting the status quo and increasing the power of those who serve it, such as officials of the Executive Branch."¹¹⁰ This statement worries me.

I have been to many induction ceremonies for new judges. As would be expected, but invariably it is true, each new judge says in one way or another, without regard to whether they are identified as conservative or liberal or in-between, that they consider it the highest honor as a lawyer to be part of the greatest institution in the world, the federal judiciary. Are they thinking of *Gideon*, *Miranda*, and *Brown* when they say that?¹¹¹ I like to think so. When they wax effusive about the judiciary, at some fundamental level they know, I believe, that without the ability of the *individual* to obtain something called real justice in a court of law we have dissolved the glue that keeps us together as one nation and drained the life from the freedoms we say we cherish.

108. See *supra* note 6 and accompanying text (referring to the congressional act regarding Theresa Marie Schiavo).

109. D.C. Dist. Court of Appeals v. Feldman, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

110. Irwin P. Stotzky, *The Constitutional Scholar*, 58 U. MIAMI L. REV. 1, 1-2 (2007).

111. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

So it is my hope and prayer that I will do my part, that all of our judges will do our part, to comport ourselves and interpret the laws and Constitution in a manner worthy of our office, and that you who are lawyers, future lawyers and citizens will do your part to preserve and protect the continued independence of the judiciary by speaking the truth against unwarranted attacks, by opposing unwise legislation that would compromise the independence of the Third Branch of government, and by representing those who, without you, would have no advocate. To quote the words of Edward R. Murrow: "Otherwise, it's not America."¹¹²

112. Wershba, *supra* note 47.

ARTICLES
