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**Georgetown University Law Center &
American Law Institute**

**"Fair and Independent Courts: A Conference on the State of
the Judiciary"**

**PANEL:
Judicial Independence:
Justifications and Modern Criticisms**

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PIERRE THOMAS: Good morning, everyone. Let me begin with a disclaimer. I am not an attorney, but my wife is an attorney, and she is a graduate of the Georgetown University Law Center. She is one of the smartest people I know. She might be watching; I had to say that. And thanks in part to Georgetown, I lose most of the arguments in my household. I'm very honored to be participating in this very important conference, Fair and Independent Courts: The State of the Judiciary; and this panel in particular, Judicial Independence: Justifications and Modern Criticisms. I am joined by an illustrious panel – Professor Jack Rakove, the William Robertson co-professor of history at Georgetown University (sic), the Honorable C. Boyden Gray, the U.S. Ambassador to the European Union, and Professor Kathleen Sullivan, the Stanley Morrison professor of law at Stanford University. (Applause.)

In some ways, what we are here to discuss today is a uniquely American dilemma. Our Constitution demands that courts must be fair, impartial, and independent, free to make decisions without undue influences by outside forces. That is what we all hope for. But there are critics who believe that judges in general, and federal judges in particular, are, with their lifetime appointments, untouchable and increasingly isolated from the people that they serve. Increasingly, contentious confirmation hearings for the U.S. Supreme Court may become the norm. And with hot button issues such as abortion, affirmative action, separation of church and state, and the many legal issues related to the war on terror, much is at stake.

How does the nation find the right balance? With such an extraordinary panel, I am certain we will have a thoughtful discussion, so I'd like to begin with – I think Mr. Rakove has some remarks.

JACK RAKOVE: First, I would like to say how great it is a pleasure it is for me, and I'm sure for my colleague Kathleen, to be on a platform that Justice O'Connor has just introduced. She is our most celebrated alumna at Stanford, and I'm also proud to say, the mother of one of my early Stanford students, so it's a great pleasure for me to be here under these circumstances.

When a historian like myself who spends most of his waking hours in the 18th century is asked to comment on some matter of contemporary concern, typically we have two kinds of responses that we can make. The first is the standard disclaimer – sorry, but that's after my period – (laughter) – which is not going to work this morning. And the second one, which I hope will work, usually runs something like this – it's more complicated than you think, or it's more complicated than that. So what I'd like to do very briefly, for just a few minutes, is to try to explain something from a historian's vantage point about why the concept of judicial independence, especially as it came to be understood by the founders of the American republic in the late 18th century, was a source of complication as well as of discovery – why it was a problem for them as well as why it came to offer a set of solutions to other sets of constitutional problems.

I think we have to start by asking, if you use the term judicial independence in the 18th century, independent of whom would be the first question you would want to ask.

And the standard answer you would have made at least down to 1776 if you were an American colonist is judicial independence means, primarily, independence from the executive branch. It's independence from the crown. That was the great principle that had been recognized in the Parliamentary Act of Settlement of 1701, which was when judges first came to enjoy tenure during good behavior.

Eighteenth-century Americans did not have a particularly exalted image of judges. There were a few celebrated judges in English history whose memories they relished. But most 18th century Americans, including as distinguished an attorney as John Adams, would have said that the real decision makers in the courts of law were to be juries, and that the competence of juries extended to matters of law as well as to matters of fact, and that judges indeed, it sometimes seems to me, were regarded as little more than glorified bailiffs, presiding over trials but not really existing as independent legal authorities. And this, by the way, is also the position that Montesquieu takes when he discusses the English constitution in the famous passage of the *Spirit of the Laws*. Montesquieu, being French, got a lot of things wrong about what he thought he'd been observing in France. You know, the French are long on theory and short on empirical accuracy. Montesquieu really thought the juries – in a moment when judges were indeed starting to acquire the authority that we now ascribe to them – but Montesquieu's passage on English courts is clearly about the decision-making role of juries, and not of judges.

So to understand where and how our concept of judicial independence emerges, we need to understand that the idea of an independent judiciary had to swim – in a certain sense – upstream against existing attitudes and, one could even say, existing prejudices about the nature of courts and the nature of judges. So we have to ask the question why then at the end of the 18th century, why – particularly, we've already quoted Federalist 78 this morning, which is kind of the locus classicus for this theory – why and how did this idea emerge?

And there are just three basic points, but I think three fairly powerful points, to be made. The first one, I think, should be familiar to everyone in this audience. The idea of an independent judiciary, as Hamilton makes clear in Federalist 78, was deeply and intimately tied to the whole concept of judicial review. In fact, one of the interesting things about that essay, when you read it closely, is that Hamilton begins by talking about judicial independence in general, and then almost as an aside, but then as a more profound thought, starts talking about judicial review as the most important application of what judicial independence would be. So for that to take place, the first key development that had to occur was that Americans had to begin thinking of constitutions as supreme, fundamental law. And thinking of them as such – as numerous legal scholars, constitutional historians like myself have argued – thinking of them as such meant thinking that if constitutions were law, then they must be judicially enforceable. Whether they be uniquely enforceable by judges or enforceable by all three branches of the national government, that's a question that we're still debating.

But that's the first and most obvious change. And that's a change that had taken place essentially from 1776 to 1787. That, I think, in some ways more than the idea of the

independent judiciary, is probably the single greatest contribution of American constitutionalism in this period – the very definition of what a constitution was. This is a familiar story, of course, because this is a story that we tie, rightly or wrongly, to *Marbury vs. Madison*, a case that most historians and many constitutional scholars think is vastly overrated in its influence, but it's still an interesting and important case.

The two less familiar points that I want to make, just very briefly, the other changes that had to take place are twofold. First is, one had to think much more skeptically about the role of representative assemblies, representative legislatures that had been true before 1776. Down to 1776, Americans would have said that just as juries are the great protectors of their rights and was competent to decide matters of law and fact alike, representative assemblies were thought of not primarily as institutions to make law – to make positive law, to legislate in the act and sense of the term. They were thought of first and foremost as a checking mechanism, as a restraint on executive power. And the great shift that takes place in American constitutional thinking after 1776 for which I think James Madison, my own favorite subject of scholarly inquiry, is most directly associated, is recognizing that in a republic, unlike a monarchy, the real action is going to take place in the legislature, or what Madison calls the impetuous vortex – a wonderful 18th century term – the impetuous vortex of the legislature. And it's against the legislature that the greatest safeguard and that the greatest prudence has to be directed.

And so the concept of judicial independence comes, it seems to me – emerges as a kind of complement to the recognition, which I think Madison is originally the leading spokesman for, that legislatures henceforth – not previously, but from 1776 on – legislatures henceforth are going to be the real locus of republican politics. And they're going to act impetuously, as Madison believes 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.

The last point I want to make – the third major argument is where this concept comes from – is the idea that an independent judiciary is also tied, I think, very directly to the peculiar problems of federalism in the American system, by which I mean, assume we're going to have two levels of government elected by the same population, acting upon the same population, with their jurisdictions overlapping, regulating many of the same activities, but from a somewhat different perspective and a somewhat different level. How do you accommodate, how do you reconcile, how do you mediate the conflicts that are likely to arise between those two levels of government? The idea of judicial enforcement of constitutional norms as a mechanism of federalism also seems to

me, therefore, to be one of the great discoveries and one of the great inventions of American constitutionalism.

There were alternatives. You could have given Congress a power to negative all state laws. That was James Madison's favored proposal going into the Constitutional Convention. But that would prove not very popular. The recognition that you need an independent judiciary to enforce federalism, to kind of police the boundaries of federalism, to resolve the numerous conflicts that would inevitably arise, that it seems to me is the last great legacy or the last great explanation of where originally our concept of an independent judiciary comes from. Thank you.

(Applause.)

KATHLEEN SULLIVAN: Let me echo my colleague, Professor Rakove's thanks, for the privilege of being at this conference. And let me begin by echoing his point that the principle of judicial independence is as old as the republic. You can recall that among the many usurpations of the crown of which we complained in the Declaration of Independence, one was the lament that the British king had made judges dependent on his will alone for the tenure of their offices and the amount and payment of their salaries. And recall that Chief Justice Marshall, early in the 19th century, once said that the greatest scourge an angry heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt or a dependent judiciary.

But it's not just an original tenet of the federal judicial system, which of course is protected under Article Three by the promise of life tenure or holding offices for good behavior, which has been interpreted as life tenure, and non-diminishment of salaries. It's also a principle foundational to the state judiciaries. Recall the 1780 Massachusetts Constitution, which said, it is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit, or which also said that it is essential to the preservation of the rights of every individual, his life, liberty, property and character that there be an impartial interpretation of the laws and administration of justice.

Now, you might say, how can independence of the judiciary be the case in the state courts when 39 states use some form of judicial election, either to place judges in office or to retain them in office? And the answer to that is there have been many other ways in which judicial elections have been constrained in the states, both through the length of office – longer terms than elected political officials – through restraints on partisanship – limitation on partisan ballots or on partisan activities – and through restrictions on judges' ability to go out into the hustings and fundraise like other politicians. So there is an effort in the state as well as the federal judicial system to maintain these fundamental principles of judicial independence from the time of the founding.

Now, my colleague, Professor Rakove, has spoken of the three basic origins of independent judiciaries in the principle of judicial review, the fear of legislative

supremacy, and the invention of federalism, which gives us double security along with the horizontal separation of powers in the federal government itself. What I'd like to turn to is three contemporary justifications that we might have for judicial independence. What function does it serve? What values does it embody? And I summarize these three as the rule of law, as Justice O'Connor has already spoken of, the separation of powers, and the principle of due process. And let's try to peel these apart one by one.

We start with the rule of law and we know that the notion here is that while political representatives of the people must be responsive to popular will, judges – we think – are to uphold the rule of law without regard to personal beliefs or voters' values – voters' views – without being beholden to any who put them on the bench or fearful of reprisal for what they might do there. To sum up this view, you can recall what Chief Justice Roberts said in his hearings before the Senate Judiciary Committee. He said judges are not politicians. They cannot promise to do certain things in exchange for votes. Well, that's a description, but what's the explanation? Why does the rule of law matter to us?

And I want to suggest that it matters to us most for a reason of time, a temporal reason. The rule of law is about connecting us to our own past, to our constitutional commitments – the Constitution is in a sense a large diet that tells us to resist temptation when it's before us, a set of pre-commitments to exercise restraint when we're tempted to give in to prejudice or to fear or to temporary emergency. So the idea is to maintain our fidelity to our own past, not only for the exercise of the federal constitution as a restraint on contemporary governance, but also through fidelity to the emergent and incremental principles of the common law. The rule of law is about making sure that we do not in the short term disavow the principles to which we've committed in the long term. Rule of law is about maintaining integrity with our past and forswearing too hasty an exercise of rash judgment.

Second, we know that judicial independence has to do with the separation of powers. But again, that more describes than explains why it's so important. And of course, Hamilton in Federalist number 78 has been quoted often already this morning, but led me add a further explanation he gave from Montesquieu. It was all right to quote the French in those days. He said, "I agree with Montesquieu in the spirit of laws, but there is no liberty if the power of judging be not separated from the legislative and executive powers. Liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments."

Now, the key point here is that the separation of powers is not an end in itself. It's a means of maintaining liberty. It's a means of making sure that no branch can exercise tyranny over the others, and with tyranny over the others, tyranny over us. The idea here is that if judges were to advance the interests of the executive or the legislative branch, they can allow those branches to aggrandize power in a way that threatens individual liberty and property. That's what the Massachusetts Constitution meant when it said it is essential to the preservation of liberty that we have independent judges.

So the judiciary serves a checking function on popular excess, and not just popular excess with respect to prejudice on the basis of race, or national origin, or gender, but popular excess as the framers were most concerned about with respect to debt relief or the taking of property without sufficient public justification or just compensation. Whether for economic reasons, abuses of property, or abuses of liberty, the judiciary is to serve this checking function. So said Hamilton again in Federalist 78, if a legislature transgresses stated limitations – for example, the ban on ex post facto laws or bills of attainder – or exceeds its delegated powers, it is the courts that must declare the acts void, or else – Hamilton’s words: “All the reservations of particular rights or privileges would amount to nothing.”

And finally, independent courts serve the value not just of rule of law, not just of separation of powers as a guard to liberty, but finally of individual due process, of the notion that as our Supreme Court has said many times over, we each should have an opportunity for fair trial in a fair tribunal with no actual bias or interest in the outcome of a case. So impartiality in individual cases is a hallmark of our notion of due process, and the independence of the political branches from the judiciary helps to ensure the fair treatment of those before the courts who might otherwise enjoy partisan advantage or favoritism, or suffer popular or partisan loathing or prejudice.

So again, just to sum up, judicial independence should not be confused with judicial autonomy – judges do not give the law to themselves. Judicial independence rather, as Justice O’Connor suggested, is not about protecting the judges, but protecting all of us in society. Because of these three key themes – rule of law, separation of powers, due process – the independence of courts is a means to those ends, which in turn are a means to the end of liberty, which is after all the most important American value. Thank you very much.

(Applause.)

C. BOYDEN GRAY: Thank you. It’s great fun to be back among friends. (Laughter.) I have said to people – people say, well, how do you like your job? And I say, well, I thought that trading away time sheets would be worth it. And after dealing with the bureaucracy abroad and my own bureaucracy, I’m caving and saying time sheets are better. (Laughter.)

I do want to talk about Europe and use that as a foil perhaps for showing or trying to illustrate how important judicial independence is here, and how much we stand to lose if we forget some of the basic principles behind it. And I want to take off from Jack’s comments about federalism, because Europe is right now struggling with these very same concepts, and we – I think – have a great deal to lose if we don’t remember where we all came from in this and keep our eyes on the ball and on what the fundamentals are all about.

We have this great nation and this great economy thanks to Hamilton and Marshall who had the vision of a strong internal market and the result, I think, to quote a

European historian – a little bit of envy, I think, in what he is saying – Paul Johnson – known to all of you, I’m sure – he wrote just very recently, quote, “the judgments Marshall made and inspired during his long tenure form the firm legal basis on which entrepreneurial capitalism could flourish mightily. There has been nothing to rival Marshall’s creative work in the entire history of jurisprudence. Countless millions of ordinary Americans enjoy affluence today because Marshall gave capitalism the green light.”

Now, that might not be the interpretation of Marshall by my colleagues here, but that is a European speaking, I think as I say again, with some envy. He came up with the dormant commerce clause, which is little known, but a very, very powerful doctrine, so boring I hesitate to mention it in any kind of audience, except maybe this one. (Laughter.) But, it is very, very important, and we ought not lose sight of what he did in policing federalism to keep the states from interfering with the proper functioning of the national government. And this was Washington’s vision, Hamilton’s vision, which Marshall carried out. Lest you think this is trivial, I point out to my European friends, the wine lovers there, that it was only about a year ago that some members sitting here in front of me swept away the laws that prohibited direct shipment of wine from Napa Valley to personal homes. Professor Sullivan was on the other side of this issue from me. I’m glad to have lost. But it shows the power of the dormant commerce clause that it could trump a written amendment known as the 21st Amendment. (Laughter.)

Now, the problem in Europe is, they are where we were at the beginning of Marshall’s tenure in many, many ways. They sometimes – some British wits – sometimes refer to us as the old country, because we’ve been through so much of this that they’re now struggling with, both the question of federalism and the question of deregulation or regulatory reform. Monnet – one of my parlor tricks is to take quotes from Monnet and quotes from Hamilton, mix them up, and see if people can guess who said what – the trouble with Monnet, his vision, if he were put to a vote today, he’d be rejected in Europe, which is sort of sad. But the problem is the member states – I mean, this is something that I think that Marshall would have found or Hamilton would have found quite familiar – the member states have been unwilling to give up control. And what that means is, of course, they continue to promote the economic interests of the incumbent firms in their countries, this economic patriotism, which makes the internal market that much harder to prevail, and it raises barriers to entry, inhibits innovation, small business, et cetera.

The problem with Europe is they’re just overregulated thanks to this system. They can’t break through it thanks to the fact that they haven’t had a Marshall with the vision and the power to do all of the level playing field that is necessary. They have very high unemployment; they can’t integrate their Muslim populations, which is very dangerous for terrorism as we all know; they’re actually depopulating, not restoring their own populations – the one exception sort of proves the rule, which is Ireland, which has had 7 percent GDP growth for the last fifteen years and it’s the only country enjoying a baby boom – now maybe that’s just coincidence, but I’m not sure it is.

So Europe is going through something of an identity crisis now because they can't break through this. They know what they have to do. There's a former prime minister of Luxembourg who made a famous statement: we all know what we have to do; we just don't know how to get elected after we've done it. (Laughter.) President Barroso has called for a stronger European Court of Justice. Now, I'm not so sure that he really means that, but the point I want to make is they don't have yet realized their internal market. They have some rulings from their court on the free movement of goods, but they haven't really done it for the other three pillars, which are services, people and capital.

And I think the fundamental problem here, familiar to administrative lawyers, is they don't have an administrative procedure act, and they don't have a D.C. circuit and backed by the Supreme Court to enforce it. There is no judicial review of agency action. This is the most important source of lawmaking in Europe, as it is here. And there is no judicial oversight. There is no judicial independence. The Europeans say it's because they don't want to import trial lawyers, but the real reason is that member states don't want to give up control; they want to maintain control, and this is precisely where Hamilton and Marshall would be very helpful to them, because that's what they saw as the danger, and the Europeans – but one of the things is why I don't think trial lawyers really are the problem, I think that's a surrogate argument for we don't like activism, the problems of activism here are well-known over there, and that is what they're afraid of. So we risk our own ability to maintain control of our own system by scaring Europeans away from this. I have often said that the best way to cement the relationship between Europe and the United States, after all we are all Europeans most of us, and we owe our legacy, Montesquieu or not, to European thinking. Why should we be fighting with them? The way to seal the deal, to reconcile us as allies is we trade to Europe our trial lawyers in return for the French farmer. (Laughter.)

I suggested this to a high-ranking German official, and there was a long silence. This was about three months ago, and I thought, gee whiz, they're going to send me back very, very quickly, which wouldn't be too bad – timesheets maybe. But she said – after long hesitation she said, if you take the German farmer too you have a deal. (Laughter.) But, the problem I want to try to just identify, though, is that we should be exporting our values of a level playing field, of a rule of law, of administrative procedure that sets out the rules in advance, rather than allowing, as the Europeans often do, sort of making them up in the middle of the game, and trying to dictate outcomes based on favorite incumbent industries.

This is all very dangerous for us. They are now exporting their regulatory regimes, and we're going to get frozen out. It's not going to matter what we do here in this country with our system's checks and balances and review. The Europeans are going to export their system, which denies all the values that we've gotten from this judicial independence. My plea is to not make our system so unattractive and scary to foreigners, which is what this conference is about, but let's as we think about importing law and looking at other sources of law here. Let's get about the job of exporting our values abroad and making sure that we are competing with the Europeans to lay out for different – you know, different countries are different – but to lay out the whole notion of a level

playing field, fair and honest and transparent and open accounting for how decisions are made. That's what we have to offer. We're not selling it well enough. Let's do a better job. Thank you.

(Applause.)

MR. THOMAS: I think we want to shift now a bit to the other half of the discussion in terms of the modern criticism. And I guess my first question for the panel is, we've established that criticism of the judiciary is not a new concept, but are we seeing something new today, and what is the root of this frustration? Kathleen, do you want to start?

MS. SULLIVAN: Well, criticism of the judiciary is not a new concept. We had an impeachment in 1805 of Justice Samuel Chase, and it was unsuccessful. He was not convicted, and we've had thirteen other impeachments of judges over the life of the republic, only seven of which resulted in convictions, and they were always for personal derelictions, concerning financial improprieties and so forth, none for the actual decisions they made and that's a very good thing. So the effort to try to interfere with judicial independence is also as old as the republic, and it came partly out of a concern that victorious Jeffersonians had about the federalist court backing scheme in one of the nation's first elections. So the concern about judicial independence and trying to check the partisan packing of the courts is old. But what we are seeing that's new today, I think, are a couple of things. First is the vilification of so-called judicial activism, and a loss of a sense that when judges invalidate excesses of power or violations of individual rights, they are doing exactly their constitutional job. And so the vilification using this simple epithet, which is so inappropriate, is something that has become popular parlance.

And then second, that's kind of replicated in a kind of newly viral fashion by new means of communication. So we've got a kind of – the blogging of vilification, so to speak, which has an affect on popular views – so this conference is trying to check those tendencies to misunderstand checks and balances, which are appropriate, as judicial activism, which is a meaningless term.

MR. RAKOVE: Taking the long view, which I suppose is my forte, I do think there is a – as Kathleen has already suggested – there is an interesting link between the politics of judicial appointment as they were first dramatized, specifically in 1801 and 1803 with the transition from the federalists to the republicans, and the enactment of the two famous judiciary acts. And what sometimes has been called the appointments mess, in which the nation has been more or less mired, depending on how you date it, since perhaps the early 1970s and certainly for the last couple decades. I know we have a separate panel that deals with judicial selection, so I wouldn't want to stress this, but I think one key point to be made is that when the federalists passed – just to refresh your memory, when the federalists enacted the Judiciary Act in 1801, a lame duck Congress and a lame duck administration, what they were attempting to do obviously was not just to provide patronage for party loyalists, but to lock their viewpoints into the national

government for some indefinite period to come, taking advantage of the principle of tenure during good behavior.

And that's a – in terms of strategy, what they were doing makes political sense. It's opportunistic, but if you can do it and get away with it, and you've lost an election and you're trying to entrench yourself, in some sense, in the national government, why not do it? It seems to be interesting about that as an episode, and what's troubling me about the current politics of judicial appointment, and not just Supreme Court justices, but throughout all the ranks of federal judiciary for the last couple decades, is that it's easy to demonstrate – just read Federalist 78 again – that the logic of adopting the English principle of tenure during good behavior was to promote the value of judicial independence. But with the right kinds of vetting procedures, or the right kinds of litmus test to use the popular phrase, it's just as easy to turn the principle of tenure during good behavior into a way to entrench your viewpoints to an extent that might call into question the extent to which a judiciary serving during good behavior really is politically independent.

And there's a lot of troubling implication to this, but I have found myself wondering whether some of the larger concerns about other forms of regulated judiciary might be tied to the increasing politicization of the appoints process itself, which has been so conspicuous a part of American politics, I think, since the early 1970s and certainly since the 1980s.

JUDGE GRAY: I am tempted to jump into the next panel because of my experience with judicial confirmations, but I'll restrain myself and not do that. But I do want to point out, de Tocqueville was quoted last night in a preparatory session that we had, but one of the quotes that's very well known is his observation that one of the geniuses of the American system was its ability to turn difficult political issues into judicial ones for resolution by the courts. So this notion of having the courts get into the very thin line between politics and law is very, very old.

And I said to you last night – I gave the example of the chief justice, for whom I clerked, and we would say, John, gosh isn't it great, *Brown v. Board of Education*, what a heroic to get nine votes, et cetera, and his view always was – and this might surprise many of you in this room – well, we really shouldn't have had to decide that. We shouldn't have, in many ways. Had we had *Reynolds v. Sims* and *Baker v. Carr* and less malapportioned legislatures, perhaps the state legislatures and the national legislature would have taken care of it, but they didn't so we had to get in. That's, I think, perfectly legitimate and part of the American system. But it has been this plan to join; it's built into the system, and it requires that justices be as attuned to political currents as anybody else in public life.

MR. THOMAS: Excellent. Public criticism – to what degree should judges be listening to it, thinking about it or ignoring it?

JUDGE GRAY: I, for one, would hate to see public criticism cease. I would venture to say that most - however some justice might or judge might feel the morning after or the morning of reading something that they didn't like, probably a month later was grateful for the fact that in our free society this can still happen, and what a terrible thing if it couldn't.

MS. SULLIVAN: Yes, but there are limits. Public criticism is, of course, vital, and public criticism does seep into the consciousness of the court over time. We wouldn't have had the overruling of *Plessy v. Ferguson* and *Brown v. Board*, or the overruling of *Lochner* and related cases and the New Deal decisions, unless public criticism of the courts' role in promoting laissez faire over social redistribution or entrenching segregation in the face of commitments to equality. We wouldn't have seen those changes unless public criticism had seeped into the consciousness of the court. So of course that plays a vital role in our constitutional evolution.

But on the other hand, public criticism can distort the values we described before - rule of law, separation of powers and due process - if judges are turned into objects of political tarring and feathering and vilification and campaigns and treated just like other politicians in campaigns or in the kind of quasi-campaigns involved in federal appointments. So it's very important to understand that judges can't fight back in the same way as other politicians on the hustings. Judicial canons of ethics prevent one from predisposing oneself to a point of view in public, and it's not fair to let one side fight freestyle and the other follow Marquess of Queensberry rules, as Justice Scalia once said. So the idea that public criticism should be unleashed on judges when canons of ethics and responsibilities to their own impartiality keep them from fighting back in public in the way that other politicians might, suggests that we don't want to just turn judges into people who are subject to the same kind of public criticism as anybody else. It ought to be tempered, it ought to be directed at decisions that don't - it ought to be directed at things that don't interfere with the judge's ability to serve their independent role.

MR. THOMAS: Mr. Rakove?

MR. RAKOVE: If I think about this question, it seems to me it would be useful to ask the question whether public criticism operates in the same way with the same intensity at different levels of our constitutional system. And since the conference, as I understand it, is meant to address the judiciary as a whole, not simply questions of the federal judiciary, but the operations of courts in the states, it seems to me this is one of those cases where our natural absorption, in terms of the national media with the Supreme Court and controversial decisions taken by federal judges in particular jurisdictions, represents of one level of political consciousness. And a lot of the real action is taking place at that lower level where it's harder to get national attention and where things are much more focused. So I suppose this is another of these examples of American federalism, which is how the system works, which is in many ways over history we have had two very different sets of norms about the extent to which judges can be criticized. And at the state level, I mean, historically the controversial judges were

punished politically much more easily than obviously has been the case at the federal level.

I suppose the question to be posed at this moment, if the premise of this conference is right, is whether or not there's more of a fusion of what has been the traditional pattern of more direct, overt, more politicized criticism being acceptable at the state level, whether that's becoming more of a factor at the national level.

MR. THOMAS: And one way that might arise is this notion of threats increasing at an exponential level to judges at both the state and federal levels. So one of the questions might be, is this nasty discourse that is starting to permeate society, is it now affecting things across the board?

MR. RAKOVE: This is where I get to say it's after my period. (Laughter.)

MR. THOMAS: I mean, in other words, the criticism from the hill, the criticism like you have in South Dakota provision that would limit the immunity of judges. You have at the same time, threats to judges going up. I guess what I'm trying to get my finger on is where are we in this evolution of criticism. And again, is there something new afoot here which this conference is trying to address?

MS. SULLIVAN: There are two ways to go after the judiciary. One is to try to control who is on the court by calling for impeachment or term limits or salary freezes to drive people into the private sector, or to block or to slow down the appointments process in the federal system, or to run recall elections in the state. One way is to try to control who's on the court, and again, that's ancient. What may have changed there is the level of discourse in the state election campaigns. The increase in campaign spending. There have been a couple of judicial elections which have out-spent the federal senatorial races in those states. We've seen judges deposed in recall elections in the states. I mean, this too is not new. The famous justice of the Michigan Supreme Court Thomas Cooley, a distinguished author, was deposed in an election after twenty years of service on the Michigan court in 1885 in a party-line democratic sweep, which swept him off along with other elected officials. So again, it's not new to depose judges on party lines, but the degree of advertising, the amount of advertising, the amount of expenditure on advertising and the use of judges as wedge issues in campaigns designed to increase turnout for other offices within the state system, that does seem to be a bit of a sea change.

The other thing you can try to do to control judges is to control what they do, not who they are and who's on the bench, but what they can do on the bench. And here again we have had past examples of congressional attempts to strip the courts of jurisdiction over certain subject matters, whether it was school busing or school prayer. We've seen prior efforts to limit subject matter jurisdiction, calls to reduce the diversity jurisdiction of the court or to limit subsidies to legal aid lawyers to bring class actions. Again, these are not new. The idea of having three judge panels if you want to overrule a state initiative or referendum, these have been with us in the '70s, the '80s, the '90s. It's not brand new at the turn of the century in the age of the Internet. But the kind of ferocity of

some of the attacks on judges that we see in single-issue legislation, like came out of the Florida Schiavo case, is perhaps new in its intensity, although not in its nature. And that's the reason to have some alarm here and to try to re-establish our basics and remember that judicial independence is part of our birthright, and we should give it away for a mess of pottage.

JUDGE GRAY: Just to make one – what I'm about to say doesn't encompass all of the problems at the state level, but the elections are funded, and they are funded in many states by trial lawyers who are looking for favoritism, if you will, at least they think they're getting it by doing it. And of course, the business community has been organized to fight back and so that raises the stakes and it becomes sort of an escalating war. I do think the lawyers have some obligation to restrain here, too. And when I say—I'm not talking just about the trial lawyers, it's the defense bar that sometimes encourages or tolerates the behavior. But this is what does, frankly, again – speaking from my experience in Europe – does worry foreigners. It's this kind of activism that's surrounding all of this, and even though they're letting in class actions now in Europe, it really does give our system a bad name abroad and does make it hard for them to understand the other values of what we really should cherish and preserve here.

MR. THOMAS: I guess my final question would be which of the threats, both at the state level and at the federal level, do each of you see as the most profound and the most likely to take effect?

MR. RAKOVE: I will start by saying, from my very distant perspective, that it seems to me that all the questions surrounding the post-9/11 Constitution, all the things that are being agitated literally on Capitol Hill today, raise the most interesting and troubling sets of questions, but precisely because it's also the most novel set of issues that the nation as a whole faces. I think they're at least easy to reconcile with the broader sets of questions about attitudes about judicial activism more generally. But, it seems to me jurisdiction stripping, as it relates to the DTA and the NCA and all the other acronyms surrounding the recent legislation, over the long run, I'm fairly convinced that ten, fifteen, twenty years from now, will probably be the most interesting, or longer, the most interesting questions that historians like myself at that point would want to look back and see how they were resolved.

The other question is whether – to pick up on your previous one, is whether or not, it is a fair question – has the nation moved into a new phase where judicial activism, you which has been, perhaps the phrase wasn't used previously but some equivalent could have been identified, and we've seen some kind of quantum shift in the politics of attacking the judiciary. It's a little – I think it's a little too early to tell, to be honest.

JUDGE GRAY: One comment from my experience dealing with, when I was in the White House and elsewhere dealing with the confirmation of judges is just the very simple fact that the Supreme Court and the Courts of Appeals, especially DC, have a lot of power, which has been given to them by the Congress. It's not as if the Congress is totally blameless in the power that puts the Supreme Court in the spotlight and the

appellate courts in the spotlight. One thing they could do, just a small thing, is not enact so many legislative ambiguities where they kick the ball down the road. And it's very comfortable for them. They don't want to strip the courts of the jurisdiction to take them off the hook, but it would help if they were a little more precise. They could solve some of this themselves.

MS. SULLIVAN: I don't think the worst problem is the public discourse. You can fight bad speech with more speech. But the greatest problem is, I think, the movement in the federal government between Congress and the President to reduce the judicial check on the progress in the war on terror. If we think back in our history, none of the branches has covered itself with glory in protecting our civil liberties in wartime. Lincoln suspended the writ of habeas corpus. Roosevelt interned 130,000 American citizens and legal residents of Japanese descent. Francis Biddle, the attorney general to FDR, said he didn't think the constitutional difficulty greatly troubled Roosevelt. The constitutional difficulty has never troubled any wartime president.

And Congress has been supine in the face of these. It didn't stop Lincoln. The court only stopped him after the war and Milligan. It didn't stop the internment; it abetted the internment. And it passed a lot of laws during World War I that limited dissident speech. Sometimes the court has gone along. It did decide *Korematsu*, a case that lives in as much infamy today as Pearl Harbor did at the time that prompted the internment. Yet, the court also decided the *Steel Seizure* decision, telling the president in the middle of the Korean hostilities that his commander-in-chief power was not a blank check for running the nation's economy, a point echoed by Justice O'Connor in the *Hamdi* decision. And the courts have been an important check on exercises of very understandable executive views.

It's understandable that the executive branch wants to do its job to protect us. It's understandable that the Congress doesn't want to do anything in its appropriations power that would take money back from troops already dispatched into danger. So it's really only the courts that have the institutional competence and freedom from political will, who can stop warrantless invasions of privacy, detention without notice of the charges against you. It's only really the courts who can intervene in moments like that. It's the insidious and incremental efforts to chip away at the power of the courts over those kinds of problems that is perhaps the greatest danger. It reminds you of the frog who is in the bucket of water that gets hotter and hotter, one degree by one degree, and he doesn't realize he's been cooked. We have to be aware that small procedural innovations like jurisdiction stripping can lead to large deprivations of security later. So that's the greatest threat, not the discourse which can be corrected through better speech, which this conference exemplifies.

MR. THOMAS: Well, I want to thank the panel. I'm better for my short time with you.

(Applause.)

(End of panel.)

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