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Judicial Independence

William H. Rehnquist

SYMPOSIUM REMARKS

JUDICIAL INDEPENDENCE

The Honorable William H. Rehnquist *

I. INTRODUCTION

Thank you, Judge Wilkinson.[1] This afternoon, I am delighted to participate in the University of Richmond School of Law's Symposium on Judicial Independence. This symposium is being held in honor of Chief Justice Harry Carrico who has served forty-two years on the Supreme Court of Virginia, twenty-two of those years as the Chief Justice. I am pleased to join all of you on this occasion in recognizing his long and distinguished career on the bench.

Judicial independence is one of the touchstones of our constitutional system of government. I like to think that the belief in the wisdom of an independent judiciary is not confined to judges alone, but is shared by other members of the legal profession and by the public at large. It is easy today to see the need for an independent judiciary, with the authority to enforce the terms of a written constitution, but back in 1787, when the Founding Fathers were drafting our Constitution, it was an entirely novel concept. I believe that the creation of an independent constitutional court, with the authority to declare unconstitutional laws

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1. The Honorable J. Harvie Wilkinson III is a judge on the United States Court of Appeals for the Fourth Circuit. Judge Wilkinson served as Chief Judge of the Fourth Circuit from 1996 to 2003.

passed by the state or federal legislatures, is probably the most significant single contribution the United States has made to the art of government.

II. THE CREATION OF AN INDEPENDENT JUDICIARY: THE AMERICAN EXPERIENCE VERSUS THE FRENCH EXPERIENCE

The importance of judicial independence is illustrated very well by looking at our experience with the Bill of Rights[2] and the French experience with the Declaration of the Rights of a Man, and a Citizen ("French Declaration of Rights").[3] The Bill of Rights was ratified in 1791;[4] the French Declaration of Rights two years earlier in 1789.[5] In comparing the language of the French Declaration of Rights with the Bill of Rights of the United States Constitution one would have said that while there were certainly some differences, the basic guarantees provided by each were pretty much the same. But when we turn from the catalogue of rights contained in the French Declaration of Rights to what actually happened in France in the few years following 1789, we find a dramatic difference between theory and practice.

Within only a few years of the adoption of the French Declaration of Rights, a regime known as the "Reign of Terror" began. During this period of time, three hundred thousand persons were imprisoned, about twenty thousand people went to their deaths on the guillotine, and another twenty thousand died in the prisons or were executed without any trial.[6] One historian of the French Revolution has described the Reign of Terror as "judicial murder." A Revolutionary Tribunal was created to try any "political offense."[7] According to one scholar, the Revolutionary Tribunal "functioned like a court martial, inflicting only one penalty, death, with no recourse possible against its sentence." Little attention was given to the separation of the judicial authority from the legislative and executive powers. The chief legislative body

2. U.S. CONST. amends. I–X.

3. DECLARATION OF THE RIGHTS OF A MAN, AND A CITIZEN (Fr. 1789).

4. H.R. DOC. NO. 100-94, at 13 n.11 (1987).

5. WILLIAM DOYLE, THE OXFORD HISTORY OF THE FRENCH REVOLUTION 118 (1989).

6. DONALD GREER, THE INCIDENCE OF THE TERROR DURING THE FRENCH REVOLUTION 25–29 (1966).

7. *Id.* at 13–20.

was the National Convention; the Convention created the Revolutionary Tribunal, and during its brief existence frequently altered the size and composition of this tribunal to suit political ends.[8] Judges and jurors on the tribunal were appointed and removed by the Convention.[9] The Convention wrote the laws, frequently initiated the prosecutions, and effectively controlled the Courts.[10]

Trials in France proceeded with inordinate haste. There are examples of a suspect being arrested early in the morning, charged at nine o'clock a.m., tried at ten o'clock a.m., condemned at noon, and guillotined at four o'clock p.m. When even the Revolutionary Tribunal was perceived as being too slow and deliberate to do the job, a decree was passed providing that after a trial had lasted a certain period of time, jurors could interrupt and announce their verdict even though all the evidence had not been received.[11] Another law was adopted forbidding accused persons from speaking in their own defense when to do so would entail unnecessary delay or "obstruction of justice."[12]

All of this happened in a country which only a few years before had adopted the Declaration of the Rights of a Man, and a Citizen. It seems to me that the reason it happened was that during the Reign of Terror there was no independent institution that could actually uphold the rights contained in the French Declaration of Rights—the legislature was supreme; it promulgated the laws, it authorized the prosecutions, and it controlled the courts. It really didn't make any difference that all of the fine sentiments contained in the French Declaration of Rights were still formally in effect, because there was no independent organ of government in France at the time which could stand up and enforce them on behalf of the individual.

In contrast to the French experience, the American scheme included an independent Judiciary, separate from the Legislature and the Executive, and with the power of judicial review. Article III of our Constitution confers upon the judiciary life-long tenure

8. *See* 33 JAMES LOGAN GODFREY, REVOLUTIONARY JUSTICE: A STUDY OF THE ORGANIZATION, PERSONNEL, AND PROCEDURE OF THE PARIS TRIBUNAL, 1793–1795, at 54–60 (1951).

9. *See id.* at 54–55.

10. *See id.* at 54–60.

11. *See id.* at 128.

12. *See id.* at 132.

during good behavior, and contains a prohibition against diminution of compensation while in office.[13] Article III judges can only be removed from office through the mechanism of impeachment.[14] Having the security of their positions and their salaries goes a long way toward ensuring judges' independence. But how did we get from independence on paper to independence in practice? It has not been a smooth ride and several times in our history there have been significant challenges to the independence of the federal courts.

III. SIGNIFICANT CHALLENGES TO THE JUDICIARY'S INDEPENDENCE

A. *Political Conflict Between the Federalists and the Republicans*[15]

The first of these confrontations occurred very early in the nineteenth century, shortly after Thomas Jefferson's Republican party had succeeded in seizing control of both the Presidency and the Congress from the Federalists as a result of the election of 1800. Historians have called it the "second American Revolution," in which the Republicans led by Jefferson and Madison captured both the executive and legislative branches of the federal government from the Federalists who had controlled them during the first twelve years of the new nation.

The Federalists were determined to strike one last blow at their Republican enemies before losing control of the executive and legislative branches on March 4, 1801; John Adams remained President until then, and the lame duck Congress was controlled by Federalists. This Congress passed the Judiciary Act of 1801,[16] which in calmer times would have been judged to be a significant measure of judicial reform. It abolished the circuit-riding duties of the Supreme Court Justices, and created sixteen new circuit

13. U.S. CONST. art. III, § 1.

14. U.S. CONST. art. II, § 4.

15. For further discussion regarding the marked conflict between the Federalists and the Republicans subsequent to the presidential election of 1800, see WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 49–54 (1992) [hereinafter GRAND INQUESTS].

16. Judiciary Act of 1801, ch. 4, 2 Stat. 89 (repealed 1802).

judges and a number of new justices of the peace.[17] But seen from the perspective of the incoming Republicans, it was a transparent Federalist patronage scheme. It was said that John Adams stayed up until midnight in his last days in office signing commissions to the new judicial positions, and these judges were henceforth referred to as the "Midnight Judges."

When the Republicans came into power in March, 1801, they set about to undo the work of the lame duck Federalists, and repealed the Judiciary Act of 1801. But the actions of the Federalists continued to rankle; shortly after his election, Jefferson, in a private letter written in 1801, described the Federalists in these words: "On their part they have retired into the Judiciary as a stronghold. There the remains of federalism are to be preserved and fed from the treasury, and from that battery all the works of republicanism are to be beaten down and erased."[18]

1. The Impeachment of Judge John Pickering[19]

Since the Constitution provided for the removal of federal judges only by the process of impeachment, the Republicans looked around for a suitable target and settled on John Pickering, a mentally deranged and frequently intoxicated federal district judge in New Hampshire. There was no question that Pickering was a disgrace to the judiciary and should have resigned; but were mental derangement and chronic intoxication "high crimes and misdemeanors" as provided in the Constitution?

In March, 1803, the House of Representatives impeached Pickering, and almost exactly a year later, the Senate voted to convict him and remove him from office. The Senate vote on Pickering's impeachment did not augur well for the independence of the judiciary; the vote in the Senate was strictly along party lines, with all of the Republicans voting "guilty" and all of the Federalists voting "not guilty."

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17. *Id.*

18. Letter from Thomas Jefferson to John Dickinson (Dec. 19, 1801), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 302 (Andrew A. Lipscomb ed., 1903–04).

19. For further discussion concerning the impeachment of Judge John Pickering, see GRAND INQUESTS, *supra* note 15, at 127–28.

2. The Impeachment of Justice Samuel Chase[20]

The very day that the Senate voted to convict Pickering, the House of Representatives voted articles of impeachment against Justice Samuel Chase of the Supreme Court of the United States. This second impeachment proceeding was portentous with consequences. Chase was one of six members of the Supreme Court, a Federalist appointed to that position by President George Washington in 1796. If Chase were to be removed by the same party line vote as Pickering was, the federal judiciary, and particularly the Supreme Court of the United States, would almost certainly be relegated to junior status among the three branches of the federal government with no real independence at all.

As a young Maryland lawyer and politician, Chase fit the Anti-Federalist profile in his opposition to the ratification of the new federal constitution. By the time of his appointment to the Supreme Court, however, he had become a staunch Federalist. He presided over two controversial trials in 1800. When Jefferson heard in May, 1803, of a charge which Justice Samuel Chase had given to a grand jury in Baltimore denouncing some of the Republican politics, he was quick to write to Joseph Nicholson, one of the Republican leaders in the House of Representatives:

> Ought this seditious and official attack on the principles of our Constitution, and on the proceedings of a State, to go unpunished? and to whom so pointedly as yourself will the public look for the necessary measures? I ask these questions for your consideration, for myself it is better that I should not interfere.[21]

The House of Representatives first investigated possible charges against Chase, and then voted to impeach him. The articles of impeachment included not merely Chase's charge to the Baltimore grand jury, but also charges that he had shown a high degree of partiality in presiding over the trial of John Fries in Philadelphia, and of James Callender in Richmond, during the year 1800.

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20. For further information regarding the impeachment of Justice Samuel Chase, see GRAND INQUESTS, *supra* note 15; WILLIAM H. REHNQUIST, THE SUPREME COURT 269–73 (new ed. 2001) [hereinafter THE SUPREME COURT].

21. Letter from Thomas Jefferson to Joseph H. Nicholson (May 13, 1803), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 390 (Andrew A. Lipscomb ed., 1903–04).

Fries had been the leader of an uprising called Fries' Rebellion, in which farmers in northeastern Pennsylvania had risen up against federal tax assessors and prevented them from carrying out their duties. Today Fries would probably be charged with obstruction of justice, but at that time he was charged with treason, tried before Chase, and sentenced to hang. John Adams, to his great credit, and against the unanimous advice of his cabinet, pardoned Fries.

Here in Richmond, James Thomson Callender was tried under the hated Sedition Act of 1798,[22] which was aimed at repressing political opposition. Callender, a well-educated Scotsman, notorious hack writer, and great drinker, was indicted for publishing a book entitled *The Prospect Before Us*,[23] in which it was said that he brought President Adams into disrepute by accusing him of being a monarchist and a toady to British interests. Callender was fined $200 and sentenced to nine months in the Richmond jail for libel. As it turned out, Callender later met with an unhappy ending—not because of his writing though; he drank too much whiskey before taking his daily bath in the river and was drowned.

When Samuel Chase's trial before the Senate opened on February 4, 1805, in the new capital of Washington, D.C., interest naturally focused on the principals in the forthcoming drama. The Vice President of the United States and presiding officer of the Senate was Aaron Burr. Burr was a dapper man with piercing black eyes. Even as he sat as the presiding officer of the impeachment court, he himself was a fugitive from justice. During the preceding summer in Weehawken, New Jersey, Burr had killed Alexander Hamilton in a duel. Indictments against him for murder in New Jersey and a lesser offense in New York were outstanding, leading one wag to remark that although in most courts the murderer was arraigned before the judge, in this court the judge was arraigned before the murderer!

It had been left to Aaron Burr as the presiding officer of the Senate to outfit the chambers in a manner befitting the occasion, and Burr spared nothing to accomplish this objective. On each side of the President's chair at one end of the chamber were two

22. The Sedition Act of 1798, ch. 54, 1 Stat. 566 (repealed 1802).

23. JAMES THOMSON CALLENDER, THE PROSPECT BEFORE US (Richmond, Jones for Pleasants and Field 1801).

rows of benches with desks entirely covered with crimson cloth. Here would sit the thirty-four Senators who would pass judgment on Chase: two for each of the thirteen original states, and two each from Vermont, Tennessee, Kentucky, and Ohio. All of this was done to recreate, as nearly as possible on this side of the Atlantic Ocean, the appearance of the House of Lords at the time of the impeachment trial of Warren Hastings in England at the end of the eighteenth century.

Samuel Chase, who stood to lose his office as an Associate Justice of the Supreme Court of the United States if convicted by the Senate, was more than six feet tall and correspondingly broad; his complexion was brownish-red, earning him the nickname "Old Bacon Face." He was hearty, gruff, and sarcastic; one would rather have him as a dinner companion than as a judge in one's case.

Chase had enjoyed a distinguished and successful career at the bar, and in 1791 became Chief Judge of the Maryland General Court. In 1796, George Washington appointed him to the Supreme Court of the United States. His legal ability was recognized by all, but his impetuous nature made him something of a stormy petrel. Joseph Story described Chase as the "living image" of Samuel Johnson, "[i]n person, in manners, in unwieldy strength, in severity of reproof, in real tenderness of heart; and above all in intellect."[24] One of the federal district judges, with whom Chase sat had a more negative reaction: "Of all others, I like the least to be coupled with him. I never sat with him without pain, as he was forever getting into some intemperate and unnecessary squabble. If I am to be immolated, let it be with some other victim or for my own sins."[25]

Chase's principal counsel defending him against the charges brought by the House of Representatives was his long-time friend, Luther Martin. Martin was one of the great lawyers in American history, and also one of the great iconoclasts of the American bar. He was the first Attorney General of Maryland,

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24. Letter from Joseph Story to Samuel P. P. Fay (Feb. 25, 1808), *in* 1 LIFE AND LETTERS OF JOSEPH STORY 168 (William W. Story ed., 1851), *reprinted in* 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 465 (1922).

25. 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 281 & n.1 (1922) (quoting Letter from Richard Peters to Timothy Pickering (1804), *in* XXVII THE TIMOTHY PICKERING PAPERS 46 (Frederick Scouller & Roy Partolomei eds., 1966)).

and served in that office for more than twenty years. He was a member of the Continental Congress and a member of the Constitutional Convention, and was for a while a state judge in Maryland. Like James Callender, he had a marked weakness for the bottle, but at least in the short run intoxication did not seem to impair his performance in court. He was described by the American historian Henry Adams as "the rollicking, witty, audacious Attorney-General of Maryland; . . . drunken, generous, slovenly, grand; bull-dog of Federalism . . . the notorious reprobate genius."[26]

The last of the *rarae aves* in the cast of characters which assembled for the trial of Samuel Chase was the principal manager for the House of Representatives, John Randolph of Roanoke. He had been elected to Congress from his Virginia district while still in his twenties, and became in effect the administration's leader in the House of Representatives after the Republican victory of 1800. William Plumer described Randolph, not yet thirty-two at the time of the Chase trial, as "a pale, meagre, ghostly man" who had "the appearance of a beardless boy more than of a full grown-man [sic]."[27] The ultimate southern tobacco planter, he patrolled the House of Representatives in boots and spurs with a whip in hand.

The presentation of evidence before the Senate took ten full days, and more than fifty witnesses testified. The charges against Chase with respect to the trial of John Fries for treason did not, judged from the perspective of history, amount to much. The charges against him in connection with the trial of James Callender were a mishmash in which minor claims of error were mixed together with serious charges of bias and partisanship. In Chase's charge to the Baltimore grand jury, he had criticized the repeal of the Judiciary Act of 1801, and also criticized pending amendments to the Maryland Constitution which would have granted universal male suffrage without any property qualifications.

The closing arguments to the Senate began on February 20, and in the oral tradition of that time, lasted several days. On March 1, the Senate convened to vote on the counts against

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26. HENRY ADAMS, JOHN RANDOLPH 141 (Boston, Houghton, Mifflin and Co. 1883).

27. 1 WILLIAM CABELL BRUCE, JOHN RANDOLPH OF ROANOKE: 1773–1833, at 175–76 (Octagon Books 1970) (1922) (quoting LIFE OF WILLIAM PLUMER 249 (A.P. Peabody ed., Da Capo Press 1969)).

Chase; Senator Uriah Tracy of Connecticut was brought into the chamber on a stretcher in order to cast his vote.

Since the names of the Senators were called individually on each of the eight counts, the roll call took some time. At this time there were twenty-five Republicans and nine Federalists in the Senate, and it was clear that if the Senators voted along party lines the necessary two-thirds vote to convict Chase could be had.

The first roll call was on the charges growing out of the Fries trial, and on this count the vote was sixteen to convict, and eighteen to acquit. All nine Federalist Senators voted to acquit, and they were joined by nine of the twenty-five Republicans. On the next series of counts, growing out of the Callender Trial, there was a majority of eighteen to sixteen to convict, but the two-thirds rule was, of course, not satisfied. The final vote was on the charge to the Baltimore grand jury, and on this count the managers came the closest to success: nineteen Senators voted to convict, and fifteen voted to acquit, but still not a two-thirds majority.

After the roll call, the Vice President rose and recited the votes on each count, and then recited the portentous words, "It, therefore, becomes my duty to declare that Samuel Chase, Esquire, stands acquitted of all the Articles exhibited by the House of Representatives against him."[28]

The significance of the outcome of the Chase trial cannot be overstated—Chase's narrow escape from conviction in the Senate exemplified how close the development of an independent judiciary came to being stultified. Although the Republicans had expounded grandiose theories about impeachment being a method by which the judiciary could be brought into line with prevailing political views, the case against Chase was tried on a basis of specific allegations of judicial misconduct. Nearly every act charged against him had been performed in the discharge of his judicial office. His behavior during the Callender trial was a good deal worse than most historians seem to realize, and the refusal of six of the Republican Senators to vote to convict even on this count surely cannot have been intended to condone Chase's acts. Instead it represented a judgment that impeachment should not be used to remove a judge for conduct in the exercise of his judicial

28. GRAND INQUESTS, *supra* note 15, at 105.

duties. The political precedent set by Chase's acquittal has governed that day to this: a judge's *judicial* acts may not serve as a basis for impeachment.

B. Ex Parte McCardle:[29] *Congressional Power to Define the Supreme Court's Jurisdiction Absolute*[30]

The second time in American history in which the independence of the Supreme Court was challenged occurred shortly after the Civil War. Four years before the Civil War, at a time when both North and South were greatly agitated about issues concerning slavery, the Supreme Court handed down its decision in the ill-starred *Dred Scott* case.[31] There, it held that Congress had no authority to prevent slaveholders from taking slaves into the territories.[32]

This was the second time in its history that the Supreme Court had held an act of Congress unconstitutional; the first, of course, was *Marbury v. Madison*,[33] in which John Marshall established the principle of judicial review.[34] But the act of Congress invalidated in *Marbury* in 1803 was one which nobody except a very few lawyers knew or cared about; it dealt with the authority of the Supreme Court to issue writs of mandamus.[35] The act of Congress held unconstitutional in the *Dred Scott* decision was the so-called Missouri Compromise,[36] which had prohibited slavery in what were then the territories of the United States.[37] People cared a great deal about this question—it was very much in the public mind at the time the decision came down—and most people in the North were outraged by the decision. It was rightly referred to by a later Chief Justice as a "self-inflicted wound" from which it took the Court at least a generation to recover. When the

29. 74 U.S. (7 Wall.) 506 (1869).

30. For an in-depth analysis of the events leading up to *McCardle* and discussion regarding the *McCardle* ruling, see THE SUPREME COURT, *supra* note 20, at 270–73.

31. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

32. *Id.* at 452.

33. 5 U.S. (1 Cranch) 137 (1803).

34. *Id.* at 177–80.

35. *Id.* at 173–80.

36. Act of Mar. 6, 1820, ch. 22, 3 Stat. 545, *repealed by* Act. of May 30, 1854, ch. 59, 10 Stat. 277, 283, 289.

37. *Id.* § 8, 3 Stat. at 548.

North was victorious in the Civil War, and the new Republican party gained control of both Houses of Congress, the radical wing of the party did not look kindly upon the Court.

The radical Republicans enacted a series of statutes known as the Reconstruction Acts,[38] which divided the previously seceded states of the South into military districts with military governors who had authority to override state legislation.[39] The traditional trial by jury was replaced with trial before a military commission for a long list of offenses that were thought to threaten the "reconstruction" of the southern states.[40] Many observers thought that major parts of these laws contained serious constitutional flaws.

In 1867, a newspaper editor in the southern state of Mississippi, William H. McCardle, used his publication to criticize reconstruction, as well as the military officers administering it throughout the South. His vituperative editorials understandably landed him in hot water with the military. McCardle was arrested and charged with several crimes, including inciting insurrection and printing libelous statements, and was held for trial by a military tribunal. McCardle sought habeas corpus in the federal circuit court in Mississippi, claiming that his arrest and detention contravened the Constitution and laws of the United States.

The circuit court decided against McCardle, and, under the law as it then existed, he had an appeal as a matter of right to the Supreme Court of the United States, which he promptly took. Rumors abounded that the Supreme Court would use the *McCardle*[41] case to declare the Reconstruction Acts unconstitutional, and there is substantial evidence that sentiment on the

38. Act of Mar. 2, 1867, ch. 153, 14 Stat. 428; Act. of Mar. 23, 1867, ch. 6, 15 Stat. 2.

39. *See id.*

40. §§ 3–4, 14 Stat. at 428–29.

41. The Court published two opinions in this case, which often leads to much confusion. The first, *Ex parte McCardle*, 73 U.S. (6 Wall.) 318 (1868), upheld the Court's appellate jurisdiction over the actions of inferior courts by habeas corpus. The second, *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), dismissed the appeal for want of jurisdiction because Congress, in 1868, revoked the Act of 1867 which had given the Court jurisdiction in this case. The Court noted that "[t]he act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867." *Id.* at 515. Additionally, it should be noted that these cases were heard in the December terms of 1867 and 1868, respectively. However, the decisions were not handed down until the following year. Thus, they are often erroneously cited as 1867 and 1868, but should be cited as 1868 and 1869.

Court favored such an outcome.[42] But, early in March 1868, as the case was being argued before the Supreme Court and submitted for decision, Congress swiftly repealed the very legislation which gave the Court jurisdiction over the case. That repeal bill became law on March 27, 1868. Although the *McCardle* case had come up for decision at conference six days earlier on March 21, the Court had postponed decision because of the pending repeal legislation. The Court then adjourned on April 6, and ordered the *McCardle* case to be put over until the next term without any decision.

In an attempt to force the Court to act, attorneys for McCardle asked that the effect of the repeal legislation on the case be argued before the Court.[43] This request was granted.[44] When the Court finally issued its opinion the following year in April 1869, it unanimously upheld the repeal measure and dismissed the case for lack of jurisdiction.[45] In an opinion written by Chief Justice Salmon P. Chase (no relation to Samuel Chase), the Court held that Article III of the Constitution gave power to Congress to make exceptions to the Supreme Court's appellate jurisdiction, and the Court could not inquire into the Congressional motive behind the legislation.[46]

The prestige of the Supreme Court obviously did not fare well during its encounters with the Reconstruction Congress. Undoubtedly, it could have ruled differently in the *McCardle* case, but it may be that the Court's apparent decision to live to fight another day was the best conceivable one under the circumstances.

C. *President Franklin Delano Roosevelt's Attempt to Reorganize the Supreme Court*[47]

Some sixty years had elapsed between the acquittal of Samuel Chase in 1805 and the decision in the *McCardle* case in 1869.

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42. *See* 6 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864–88, at 465 (1971).

43. *Id.* at 488.

44. *Id.*

45. *Ex parte McCardle*, 74 U.S. (7 Wall.) at 514–15.

46. *Id.* at 514.

47. For further discussion regarding President Roosevelt's Court-packing plan, see THE SUPREME COURT, *supra* note 20, at 116–33.

Nearly seventy more years would elapse before the time of the third incident in American history when the independence of the Supreme Court was again threatened, this time by the President. In 1937, President Franklin Delano Roosevelt was beginning his second term in the White House by virtue of an overwhelming electoral victory in 1936 in which he won the electoral vote in all but two states of the Union. The Supreme Court was not an issue in that Presidential election, but the Court was apparently very much on President Roosevelt's mind because of certain cases the Court had decided during Roosevelt's first term as President.

In fact, during President Roosevelt's initial term, the Supreme Court had declared unconstitutional the National Industrial Recovery Act,[48] the Agricultural Adjustment Act,[49] and the so-called "Hot Oil Act"[50]—one of the centerpieces of his New Deal program to lift the country out of the Great Depression. The Court had also ruled against the government in several minor cases.[51]

Confronted with this series of defeats, President Roosevelt decided to take action. In his view, the Court had become a roadblock to the progressive reforms needed in the nation. Just as President Jefferson had in 1801 trained his sights on the Federalist members of the Supreme Court, Roosevelt planned to use his immense political resources to bring the Court into step with the President and Congress. In February 1937, Roosevelt summoned the members of his cabinet and the Democratic leadership of both Houses of Congress to an unusual meeting at the White House. There Roosevelt unveiled the message he planned to send to Congress that day, recommending that the Judicial Branch of the government be "reorganized." The message proposed that for each member of the Supreme Court who was over seventy years of age and did not elect to retire—six of the nine members of the Court were in that situation—the President would be empowered

48. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (declaring the National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933), an unconstitutional delegation of legislative power).

49. United States v. Butler, 297 U.S. 1 (1936) (declaring the Agricultural Adjustment Act, ch. 25, 48 Stat. 31 (1933), an unconstitutional invasion of the power reserved by the States).

50. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (declaring the National Industrial Recovery Act, ch. 90, § 9(c), 48 Stat. 195, 200 (1933), an unconstitutional delegation of legislative power).

51. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936); United States v. Constantine, 296 U.S. 287 (1935).

to appoint an additional Justice to the Court, thereby enlarging the Court's membership to a total of fifteen. The true reason for the plan, of course, was to enable the President to "pack" the Court all at once, in such a way that New Deal social legislation would no longer be threatened. But President Roosevelt based his public argument on the duplicitous premise that the older judges were unable to carry a full share of the Court's workload and that the Court was falling behind in its work. This reason was demonstrably false.

The proposal astounded the Democratic leadership in Congress and the nation as a whole. Political observers thought that Roosevelt would undoubtedly get what he wanted. The Democrats had a four-to-one margin in the House of Representatives, and of the ninety-six members of the Senate, only sixteen were Republicans.

The Chief Justice at that time was Charles Evans Hughes. Hughes and the Associate Justices of the Court were offered free broadcast time by the radio networks to speak about the President's plan, which Roosevelt insisted on calling a "reorganization" plan while opponents dubbed it a "Court-packing plan." The Justices wisely declined these offers and said nothing. But Chief Justice Hughes worked busily behind the scenes with Senator Burton Wheeler of Montana, a Democrat who agreed to lead the opposition to the bill.

Chief Justice Hughes wrote a letter to Senator Wheeler, using very telling statistics to show that the Supreme Court was entirely abreast of its workload and could not possibly decide cases any faster than it was doing. This letter, presented to the Senate Judiciary Committee, demolished the original justification for the bill and caused President Roosevelt to switch to a franker justification—the Supreme Court as presently constituted was frustrating the popular will by invalidating needed social legislation.

The battle in the Senate lasted from March until July 1937. One event after another damaged the plan's chances for enactment. That spring, the Supreme Court handed down two decisions which upheld, by the narrow vote of five-to-four, important pieces of Roosevelt's social legislation.[52] This was thereafter known as "the

52. *See* Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

switch in time that saved nine."[53] Next, one of the oldest and most conservative members of the Court, Willis Van Devanter, retired, giving the President the opportunity to appoint a new member of the Court without the need for the Court-packing plan. Eventually, public opinion began to rally against Roosevelt's proposal.

Debate in the Senate on the bill began in early July, in the midst of one of the worst heat waves in Washington, D.C. history. A few days after the debate began, the Democratic majority leader and floor leader for the bill, Senator Joe Robinson of Arkansas, was found dead one morning in his apartment. The Senate recessed in order to allow Senators to take the train to Little Rock for Robinson's funeral.

President Roosevelt realized he did not have the votes to pass the bill in the Senate, and he agreed on a face-saving solution by which the bill, rather than being defeated in a floor vote, would be recommitted with a tacit understanding that the provisions relating to the Supreme Court would be deleted. Supporters of the Court-packing plan hoped to effectuate this compromise by using such vague language that the casual observer would not realize what was happening. They had almost succeeded when Senator Hiram Johnson, a maverick Republican from the State of California who had opposed President Roosevelt's Court-packing plan, asked whether the portion dealing with the Supreme Court was dead. At first the floor leader tried to shunt his question aside, but the white-haired Californian persisted.

"The Supreme Court is out of the way?" inquired Senator Johnson.

"The Supreme Court is out of the way," acknowledged Senator Logan.

Hiram Johnson then exclaimed, "Glory be to God!" and sat down.[54] After a momentary pause, as if by pre-arranged signal, the spectators' galleries broke into applause—the President's Court-packing plan was indeed dead.

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53. FRED R. SHAPIRO, THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS 393 (1933) ("Popular description of Justice Owen J. Roberts's changed position in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).").

54. THE SUPREME COURT, *supra* note 20, at 132.

President Roosevelt lost the Court-packing battle, but he won the war for control of the Supreme Court. He won it not by any novel legislation, but by serving in office for more than twelve years, and appointing eight of the nine Justices of the Court. In this way the Constitution provides for ultimate responsibility of the Court to the political branches of government.[55]

IV. CONCLUSION

Three times in America's history, a politically dominant majority has challenged the authority and independence of the Supreme Court as an institution. In the 1805 case of Justice Samuel Chase, the effort was to remove a member of the Court from office because of the content of his rulings from the bench. In 1868, the congressional leadership sought to strip the Court of its jurisdiction to consider a particular case because those leaders thought the Supreme Court would rule against the constitutionality of a measure viewed by them as essential. And in 1937, the President tried to enlarge the size of the Court so that he could immediately place six of his own appointees on it and swing the ideological balance from conservative to liberal.

These incidents are to some extent an outgrowth of the tensions built into our three-branch system of government. To a very significant degree these tensions are probably desirable and healthy in maintaining a balance of power in our government. Ultimately, we have had the good fortune that through our system of checks and balances the independence of our Supreme Court and the federal judiciary has been preserved when such conflicts have arisen. We have seen that this in large part is dependent upon the public's respect for the judiciary. For it was the United States Senate—a political body if there ever was one—who stepped in and saved the independence of the judiciary, both in the Chase trial in 1805 and in Franklin Roosevelt's Court-packing plan in 1937.

I suspect the Court will continue to encounter challenges to its independence and authority by the other branches of government because of the design of our Constitutional system. The degree to which that independence will be preserved will depend again in

55. U.S. CONST. art. II, § 2, cl. 2.

some measure on the public's respect for the judiciary. Maintaining that respect and a reserve of public goodwill, without becoming subservient to public opinion, remains a challenge to the federal judiciary.

Thank you for the opportunity to speak with you today.