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CURRENT THREATS TO JUDICIAL INDEPENDENCE AND APPROPRIATE RESPONSES: A PRESENTATION TO THE AMERICAN BAR ASSOCIATION*

HONORABLE JOHN M. WALKER, JR.**

INTRODUCTION

Mr. Chairman and distinguished members of the Commission, it is a privilege for me to appear before you today on behalf of the more than 700 active and senior Article III judges who belong to the Federal Judges Association ("FJA"). I am the Association's Immediate Past President and have served as a circuit judge on the Second Circuit Court of Appeals for seven years. Previously, I served for four years as a district judge on the United States District Court for the Southern District of New York. Relevant to this inquiry, I am also a member of the Budget Committee of the Judicial Conference of the United States and am a director and faculty member of the Institute of Judicial Administration, a private non-profit agency based in New York.

The FJA is a voluntary, non-profit association. Its purpose, as set forth in its constitution, is "to seek the highest quality of justice for the people of the United States."¹ The FJA's primary objectives in fulfilling this mission are twofold: First, to preserve the ability of the federal judiciary to attract and retain the best qualified men and women for judicial service, and, second, to protect and defend the constitutionally guaranteed independence of the judiciary from intrusion, intimidation, coercion, or domination from any source.²

* Remarks of the Hon. John M. Walker, Jr. Before the American Bar Association Commission on Separation of Powers and Judicial Independence December 13, 1996, Washington, D.C.

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¹ THE FEDERAL JUDGES ASSOCIATION CONSTITUTION: A DECADE OF ACHIEVEMENT, 1982-1992 39, app. 2 (Carole Hicke ed., 1993).

² See *id.*

On behalf of the membership of the FJA, I wish to congratulate the American Bar Association ("ABA") and its president, Lee Cooper, for appointing this distinguished Commission on Separation of Powers and Judicial Independence and for conducting comprehensive hearings into these important matters. The ABA performs its most vital role in advancing the administration of justice when it conducts an important study of this sort. The FJA is pleased to contribute what it can to the Commission's efforts, and I hope that my remarks will be useful to the work of the Commission.

I. A BRIEF HISTORY OF JUDICIAL INDEPENDENCE

The framers of our Constitution were keenly aware that it was essential to the national well being, and indeed to the ability of our republican form of government to endure, that the judiciary operate completely independent of political control or influence.³ It is every bit as true today as it was more than 200 years ago that for our government to function effectively and for essential freedoms to be preserved, federal judges must do their job in an atmosphere that is absolutely free of any sense that a particular decision will invite personal retaliation or retribution. When judges take office they forswear political affiliation or activity. The judge's allegiance is not to any political agenda or popular current of social thought, but—consistent with the oath of office—to the rigorous neutral application of principles of law derived from the Constitution, statutes, and, where appropriate, the common law. As Supreme Court Justice Benjamin Cardozo stated in his lecture series on the nature of the judicial process, a judge is:

not wholly free. He is not to innovate at pleasure He is to draw his inspiration from consecrated principles. He is not to yield to . . . sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in the social life.⁴

³ See Dean John D. Feericks, *Judicial Independence and the Impartial Administration of Justice*, 51 REC. N.Y.C. BAR ASS'N 231 (1996) (providing brief historical summary of judicial independence).

⁴ *Id.* at 239 (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 141 (1921) (internal quotations omitted)).

If a judge then is to interpret and follow the law without regard to his or her personal policy preferences, the judge must feel completely at liberty to do so and must never feel exposed to potential retaliation for unpopular decisions.

Government according to the rule of law is a precious, indeed priceless, commodity; it is also a fragile one. It was established by our forefathers in response to the English experience.⁵ Throughout periods of English history, judges were not free of political control, but rather owed their allegiance to the King.⁶ Indeed, the constitutional history of England is unhappily tarnished by examples of judges being removed from office because of the King's displeasure with their decisions. Henry VII is said to have boasted that he ruled England with his laws and his laws with his judges.⁷ In Colonial America, part of the political reality that led to the stirrings of rebellion was the dependence of judicial tenure and compensation upon the wishes of the English monarch.⁸ As the struggle for independence and later a constitutional form of government grew, the idea of the indispensability of an independent judiciary was always a vital ingredient. The idea appeared in the Declaration of Independence wherein, its signatories listed grievances against the Crown, including that the King "has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers. He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."⁹ Consistent with these grievances, an independent judiciary was a common theme in the constitutions of the newly formed states and the tenure and compensation of judges was secured toward that end.¹⁰

At the Constitutional Convention in the summer of 1787, the need for an independent judiciary was equally apparent, and Article III was drafted to provide for life tenure for judges, for judicial salaries that could not be diminished during a judge's term in office and for service during good behavior, which meant removal

⁵ See *id.* at 236-37.

⁶ See *id.* at 236.

⁷ See *id.* (citing EVAN HAYNES, *THE SELECTION AND TENURE OF JUDGES* 54-55 (1944)).

⁸ See *id.*

⁹ *Id.* at 237 (quoting *THE DECLARATION OF INDEPENDENCE* ¶¶ 10-11 (U.S. 1776)).

¹⁰ See *id.*

from office only upon impeachment and conviction.¹¹ James Madison, one of the Constitution's principal architects, articulated the critical concept that the government rest upon three pillars, legislative, executive, and judicial; that these co-equal branches be separate and independent; and that each branch operate as a check and balance, one to the other.¹² The judiciary's place as the third co-ordinate, co-equal, but separate, branch of government was anchored in Article III of the Constitution.¹³

The founding fathers believed the judiciary to be the least dangerous branch, that is to say the least likely to tyrannize or oppress the people, because it had neither the sword of the executive nor the purse of the legislature; it was, as Federalist No. 78 stated, possessed of "neither force nor will but merely judgment."¹⁴ Federalist No. 78 went on to point out that in this weaker position, the judiciary "is in continual jeopardy of being overpowered or influenced by its coordinate branches" and that since "nothing can contribute so much to [the judiciary's] firmness and independence as permanency in office, this quality may therefore be solely regarded as an indispensable ingredient in its Constitution and, in a great measure, as the citadel of the public justice and public security."¹⁵ Today, more than 200 years after the ratification of the Constitution, the need for judicial independence is no less real as it was then.

This country asks a great deal of its federal judges. It was once noted by Alexis de Tocqueville, the French statesman and historian, that "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial ques-

¹¹ See U.S. CONST. art. III (providing that "judges, both of the Supreme and Inferior Courts, shall hold their offices during good behavior . . ."). See generally JOHN FINE, LECTURES ON LAW 39-40 (1852) (explaining that salaries of United States Supreme Court judges cannot be lessened while in office and that removal of judges can only be effected through impeachment); DAVID K. WATSON, THE CONSTITUTION OF THE UNITED STATES—IT'S HISTORY, APPLICATION AND CONSTRUCTION 1050 (1910) (noting that sentiment of constitutional convention favored establishment of federal judiciary endowed with full judicial power).

¹² See THE FEDERALIST PAPERS NOS. 47, 48, 51 (James Madison) (The Heritage Press 1945).

¹³ See U.S. CONST. art. III (stating that "[t]he judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish").

¹⁴ THE FEDERALIST PAPERS No. 79, at 520 (Alexander Hamilton).

¹⁵ *Id.* at 521.

tion.”¹⁶ Judges today must decide countless questions under the Constitution and statutory law: They must frequently apply broad principles under these laws and at other times resolve ambiguities and reconcile conflicting terms and provisions. Our courts are called upon to ensure against governmental intrusion of all sorts of rights and liberties of the people contained in the text of the Constitution and its Bill of Rights; indeed, one is hard-pressed to name a field of human endeavor that does not engender legal disputes and controversies which judges must resolve.¹⁷

At the federal level, it is the promise then of Article III that judges who must decide the myriad cases before them do so without fear of adverse personal consequences. Only in this way can the nation do its best to ensure that the decisions of courts are rendered without bias or partiality and according to law.

II. CURRENT THREATS TO JUDICIAL INDEPENDENCE

I regret to say that today questions arise as to whether the promise of Article III is being completely met. Judges recently have been subject to personal attacks, transcending legitimate criticism, for making unpopular decisions. I will discuss this subject in a moment. But there is another potential encroachment on judicial independence that comes from the co-equal branches, just as Federalist No. 78 predicted. These actions of the legislature and the executive of which I will speak have been undertaken, I hasten to add, without malevolent purpose or deliberate intent to weaken the judiciary, but they can, and do, have unfortunate and unintended consequences. It is this systemic concern that is the primary occupation of the FJA about which I will devote the majority of my remarks. I wish to begin, however, with some brief comments on the criticism of judges.

A. *Criticism of Judges*

During the past political season, candidates from both parties, indeed from both political branches, sought to obtain political advantage from particular decisions rendered by Article III judges. A judge from the District Court for the Southern District of New

¹⁶ Feerick, *supra* note 3, at 239 (quoting 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 290 (1945)).

¹⁷ See *id.*

York, Judge Harold Baer, Jr., was singled out for censure during the campaign season by local, state, and national political figures alike, including both the White House and the President's opponent in the general election. The attacks focused on the judge's decision to suppress evidence pursuant to the Fourth Amendment in a criminal case.¹⁸ Judge Baer, although new to the federal bench, had earned a solid reputation as a respected state court jurist. Whatever the merits of Judge Baer's decision—and of course I can express no opinion on that subject—the criticism of Judge Baer was unique, at least in this decade, for both its *ad hominem* nature and its apparent attempt to influence the outcome of a pending proceeding. In fact, the White House, at one point, implied that it might call for his resignation were Judge Baer not to alter his decision.¹⁹ The opposition candidate went one step further suggesting impeachment as a proper avenue.²⁰

Although this incident was the most conspicuous example of political criticism of judges that crossed the line of propriety and stood as a clear threat to judicial independence, it was not alone. Short of calling for resignations, other Article III judges have been singled out on the basis of results of decisions rendered in their official capacity.²¹ One Circuit Judge even publicly stated that he was resigning rather than serve as a "prime target" in a political season.²² In an opinion piece in the *Wall Street Journal*, counsel for the White House intimated that should the particular decisions of any judges appointed by the current administration, or Democratic administrations generally, become campaign issues there were ample decisions rendered by judges appointed during prior Republican administrations to serve as grist for the political mill.²³

I offer these introductory examples not to suggest that discussion, indeed forceful criticism, of particular decisions of particular

¹⁸ See, e.g., Linda Greenhouse, *Judges as Political Issues*, N.Y. TIMES, March 23, 1996, at A1.

¹⁹ See, e.g., Alison Mitchell, *Clinton Pressing Judge to Relent*, N.Y. TIMES, March 22, 1996, at A1.

²⁰ See, e.g., Katherine Q. Seelye, *Dole Tours Death Chamber in San Quentin and Calls for Speedier Executions*, N.Y. TIMES, March 24, 1996, at A1.

²¹ See, e.g., 142 CONG. REC. S2790-801 (daily ed. Mar. 25, 1996).

²² See Henry J. Reske, *Judge Blasts Politicization of Judiciary*, A.B.A. J., July 1996, at 40.

²³ See Jack Quinn, *Let's Play 'Whose Judges Are Tougher on Crime'*, WALL ST. J., Mar. 27, 1996, at A23.

courts is somehow intrinsically inappropriate. This is far from the case. As Judge William Henry Hastie has observed “principled criticism serves as an invaluable corrective of otherwise unrealized error.”²⁴ I, and all other judges, benefit from thoughtful criticism of those taking issue with the reasoning or unstated assumptions of our opinions. Indeed, the appellate process is grounded in thoughtful criticism. Nor, of course, do I suggest that personal or partisan criticism is somehow outside our tradition of freedom of expression. But when criticism reaches the level of intimidation and attempts to affect the outcome of a particular case or of future cases of like kind before a particular judge, judicial independence is imperiled.

Although Federal judges receive shelter from the political winds by the structural protections of Article III, judges are human and, thus, perhaps depending on the thickness of a judge’s skin, are not invulnerable to the influence of political pressure. To rely on constitutional protections alone is not enough. District Judge William Hoeweler—a judge who has presided over controversial cases challenging the constitutionality of correctional practices in several southern Florida counties as well as the trial of former Panamanian strongman Manuel Noriega—has commented: “Even though we have life tenure, we’re human; don’t ever think we’re not subject to outside pressures. The press, public approval, polls, there are a variety of forces that invade our thinking or at least try to invade our thinking.”²⁵ Judge Hoeweler’s observation recognizes the reality that even a thick skin and willingness to listen to criticism may, for some, be insufficient protection in the face of personal, reflexive, unprincipled attacks.

Equally important, however, such inappropriate criticism imperils the standing of the judiciary in the public eye, a matter essential to the day-to-day functioning of the courts. Without public confidence in the judiciary—lacking as it does ultimate coercive power—the respect accorded its judgments will erode. The need

²⁴ William H. Hastie, *Judicial Role and Judicial Image*, 121 U. PA. L. REV. 947, 951 (1973) (quoted in Louis H. Pollack, *Criticizing Judges*, 79 JUDICATURE 229, 229 (1996)).

²⁵ *What is Judicial Independence?: Views from the Public, the Press, the Profession, and the Politicians*, 80 JUDICATURE 73 (1996) (edited transcript of panel discussion at American Judicature Society’s 1996 annual meeting).

for deference to the courts is widely acknowledged²⁶ and examples of concern for its potential erosion abound, one of the most powerful being the Supreme Court's unprecedented nine-Justice joint opinion in *Cooper v. Aaron*²⁷ turning aside a state's challenge to the enforcement of *Brown v. Board of Education*.²⁸ Personal and unprincipled attacks on judges sap the strength of the entire judiciary.

Policing the line between appropriate criticism of particular decisions and those assaults that erode judicial independence should not be a matter for legislation but for good sense. Given the constraints—appropriate ones at that—placed on judges' public pronouncements as to pending cases,²⁹ however, judges must of necessity rely on the bar—in particular such organizations as the ABA—the academy, and more generally the public to pay close attention to the line between criticism that is proper and criticism that is inappropriate and join issue when the line is crossed. The line, I might add, is not a particularly difficult one to draw. Appropriate criticism would include pointing out defective reasoning, misapplication of the law to the facts, and a judge's clear departure from the law to effect personal policy preferences. Criticism goes too far when it consists of personalized attacks that are focused simply on the result of the judge's decision without consideration of its legal reasoning or of the facts of the case, or attacks that call for a judge's resignation or removal from office on the basis of rulings in a particular case.³⁰

B. Systemic Threats to Judicial Independence

In addition to such overt—publicly accessible—manifestations of peril to judicial independence, other less publicly noticeable but equally troubling hazards are endemic in the framework of our divided national government. The necessary reliance by the judiciary on the political branches of the government for its suste-

²⁶ See generally Joseph Vining, *Authority and Responsibility: The Jurisprudence of Deference*, 43 ADMIN. L. REV. 135, 146 (1990) (stating deference to courts is implied in phrase "the force of law").

²⁷ 358 U.S. 1 (1958).

²⁸ 347 U.S. 483 (1954).

²⁹ See, e.g., MODEL CODE OF JUDICIAL CONDUCT Canon 3B(9) (1990).

³⁰ See Feerick, *supra* note 3, at 243.

nance creates the potential for a weakening of the judiciary as an institution.³¹

The FJA over the last several years has endeavored to point out the need for vigilance in the relationship between the judiciary and the political branches. Particular attention should be directed to the process of according just compensation to judges and the operation of the budgetary process.

Fully acknowledging the constitutional and statutory obligations of the political branches in budgetary matters—particularly in these times of fiscal austerity—there is certainly a zone of appropriate budgetary control and supervision of the judiciary. We believe, however, that zone should be no greater than necessary to enable Congress to perform its proper budgetary role. In performing its budgetary responsibilities, Congress should never be concerned with the results of judicial decisions. We also question whether this role requires Congress to micro-manage the business of the federal courts. We are also troubled by the failure of Congress to exempt the judiciary from the scope of the line item veto and by recurrent efforts of the executive to exercise control over the judiciary's budget. And, of course, we are distressed over the repeated failure of Congress to provide simple cost-of-living adjustments to federal judges.

The FJA has consistently worked to protect judicial salaries from reductions in pay resulting from inflation. Concern about the effect of inflation on judicial salaries can be traced back to the development of the Constitution. The issue was discussed at the Constitutional Convention and, as a result, the Constitution gives Congress the power to raise judicial salaries.³² Hamilton explained in *Federalist No. 79* that “[i]t will be readily understood that the fluctuations in the value of money and in the state of society render a fixed rate of compensation in the Constitution inadmissible.”³³

³¹ See generally LAWRENCE A. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 3-5 (1988) (noting federal courts' dependence upon Congress due to inability to use power to review constitutionality of government action unless Congress first authorizes federal courts to exercise jurisdiction); Joseph H. Rodriguez, *New Threats to Judicial Independence*, 35 *JUDGES J.* 24, 24 (1996) (describing Congress' challenge of judiciary's lawmaking independence as result of former's authority to prescribe procedural as well as substantive rules for federal courts).

³² See U.S. CONST. art. III.

³³ *THE FEDERALIST* No. 79, at 529 (Alexander Hamilton).

Whether or not the prohibition in Article III against diminishing judicial pay contained in the Compensation Clause explicitly applies to cuts in real pay resulting from inflation, the principle of judicial independence that gave rise to the Compensation Clause's prohibition on pay reductions applies with equal force to pay reductions due to inflation. There can be no doubt that the reduction in purchasing power resulting from inflation is a real pay cut. Congress recognizes this, as evidenced by its grant of cost-of-living adjustments to almost all federal officers and the indexing of various benefits to inflation. Congress, however, in each of the last four years has refused to provide for cost-of-living adjustments for federal judges because it refused to adjust its own salary to reflect the increased cost-of-living. And it has done so despite the provisions of the 1989 Ethics Reform Act that were specifically intended to provide for automatic cost-of-living adjustments every year. Yet, at the same time, every other career federal officer in the general schedule has received appropriate cost-of-living increases designed to keep real pay even with inflation. As a result, the judges have unfairly experienced a real pay loss in four years, while nearly all other federal officers, including nearly all employees of the judicial branch, have received wage increases between eight and sixteen percent. The regular denial of the small cost-of-living adjustments creates the need for large "catch-up" adjustments in pay, like the one enacted in 1989. These large adjustments are politically difficult to accomplish and inappropriately thrust the judiciary into an awkward political controversy.

Congress has denied these adjustments notwithstanding the intense efforts of the FJA to de-link the pay of Congress and judges. Specifically, the Association has sought legislation de-linking judges' pay from that of Congress and repealing the so-called Section 140,³⁴ enacted in 1981, which requires that, unlike any other government officeholder, judges may not receive even an automatic upward adjustment, cost-of-living or otherwise, absent a specific affirmative act of Congress.³⁵

The FJA opposes the reduction in real pay resulting from the denial of the adjustments because it affects the ability to attract the most qualified men and women to judicial office and keep them

³⁴ Pub. L. No. 97-92, § 140, 95 Stat. 1183, 1200 (1981).

³⁵ *Id.*

there.³⁶ The job is one to which, we hope, concerned and public spirited persons should aspire and to which they are willing to devote their whole lives. The denial of cost-of-living adjustments to the judiciary inevitably leads to increased resignations from the bench, as occurred in the 1970's and early 1980's.³⁷

It also leads to the unseemly practice of judges having to implore Congress to restore fair compensation at the same time those same judges are sitting in review of congressional enactments and of judges seeking the support in this regard of the Executive Branch, which also happens to be the principal litigant in the federal courts. Denial of cost-of-living adjustments is also unfair. The judiciary is unlike the other political branches. Those who serve in Congress or as top officials in the Executive Branch are elected or appointed for discrete terms of office. Judges, however, make a lifetime commitment to become impartial decision-makers who, quite rightly, are removed from the political process. We believe that judges, who have chosen this career in government, are entitled to no worse treatment than other career federal employees.

The issue of these cost-of-living adjustments is not simply one of compensation. I hope I have convinced you that it lies at the heart of an independent judiciary, which, as recognized in the Constitution, should not be in a subservient position to other branches of government, and must maintain the confidence and respect of the American people.

The FJA is also deeply concerned about the general process for reviewing the salaries of all top federal officials, including judges. Prior to the Ethics Reform Act of 1989,³⁸ the authority and responsibility for reviewing quadrennially the salaries of top officials of the three branches and for seeking pay parity with the private sector was vested in the Commission on Executive, Legislative, and Judicial Salaries, popularly known as the Quadrennial

³⁶ See William H. Rehnquist, *1995 Year-End Report on the Federal Judiciary*, 19 AM. J. TRIAL ADVOC. 491, 493-94 (1996) (stating "[u]nless a solution is found to deal adequately with the issue of judicial salary erosion, it will be difficult to attract outstanding lawyers to the bench and retain them").

³⁷ See, e.g., Judith Haverman, *Panel May Urge Big Rise in Top U.S. Officials' Pay*, WASH. POST, Dec. 11, 1986, at A1 (referring to federal commission fact sheet stating "resignations of judges are at their highest level with 'inadequate compensation' stated as the prime reason").

³⁸ Pub. L. No. 101-194, 103 Stat. 1716 (1989).

Commission. The recommendations of the Quadrennial Commission were reviewed by the President and his recommendations to the Congress became law without the need for further congressional action.³⁹

Under the Ethics Reform Act these responsibilities were transferred to a Citizens' Commission on Public Service and Compensation.⁴⁰ Under the law, the first Citizens' Commission was to be appointed in 1993.⁴¹ This Commission has been a political non-starter. Apart from the fact that five of the eleven members of the Citizens' Commission must "be chosen by lot from among names randomly selected from voter registration lists,"⁴² the Ethics Reform Act required that any recommended pay increases be approved by a recorded congressional vote.⁴³ The Commission has never been fully appointed and all funding has been denied by Congress.⁴⁴ The lack of any functioning system for reviewing salaries and recommending appropriate salary levels deepens our concern about maintaining the quality and independence of the federal judiciary.

Formulation of the judiciary's budget is also an area where the political branches must responsibly exercise their power. The Constitution creates a delicate balance between the political branches and the judiciary. The Constitution gives Congress the power to make appropriations and exercise oversight over expenditures. The President has the power to sign or veto budgets passed by Congress. Consistent with the system of checks and balances set forth in the Constitution, the political branches have oversight over the judiciary's budget requests. The judiciary's budget requests are subject to full review by the congressional appropriations committees. It is the legitimate prerogative of Congress to exercise oversight over the judiciary's expenditure of funds.

³⁹ See The Federal Salary Act of 1967, Pub. L. No. 90-206, 81 Stat. 613, amended by Pub. L. No. 95-19, 91 Stat. 39, 45 (1977), amended by Pub. L. No. 99-190, 99 Stat. 1185, 1322 (1985). The first amendment mandated affirmative approval by Congress of the President's salary recommendations before an increase could take effect, but this was modified in 1985 with the restoration of congressional action only when it disapproved of the President's recommendations. *Id.*; see also *Humphrey v. Baker*, 848 F.2d 211, 215 n.5 (D.C. Cir. 1988).

⁴⁰ See 2 U.S.C. §§ 351-64 (1994).

⁴¹ 2 U.S.C. § 352(8)(A) (1994).

⁴² 2 U.S.C. § 352(4)(B) (1994).

⁴³ 2 U.S.C. § 359(2)(A) (1994).

⁴⁴ See Treasury, Postal Service, and General Government Appropriations Act, Pub. L. No. 103-123, 107 Stat. 1226, 1239 (1993) (eliminating funding).

Congress has acted in the past to preserve judicial independence in the area of appropriations. A provision in the Budget and Accounting Act provides that the proposed appropriations for the judicial branch shall be submitted to the President and included in the budget transmitted by him to Congress "without change."⁴⁵ This provision, when obeyed, serves to place appropriations requests outside the control or influence of the Executive Branch's Office of Management and Budget ("OMB"). Unfortunately, in recent years OMB has had to be reminded on more than one occasion of this provision of law, and the President has even been called upon to intervene on the judiciary's behalf. That the President has always been willing to do so is a testament to the President's sensitivity to the need for judicial independence.

We are concerned, however, that the recent line-item veto legislation⁴⁶ could upset the delicate balance created by our Constitution. Under the new law, almost all of the judiciary's appropriations are subject to a line-item veto by the President. As the Chief Judge of the Sixth Circuit Gilbert S. Merritt testified before Congress, in support of an exemption of the judiciary from the line-item veto, "[i]t requires little imagination to see how a threat to judicial independence could come from undue financial pressures by the Executive Branch."⁴⁷ This is especially so because, as noted earlier, the United States, and in particular the Executive Branch, is the most frequent litigant in the federal courts.⁴⁸

CONCLUSION

The legacy of judicial independence, left to us by the founders, is among the most precious political and social assets of our democratic system. Like any legacy, however, it must be valued and protected. Although, in large measure, the judiciary has successfully withstood challenges over the years, without vigilance there is no guarantee that it will continue to thrive. Whether the

⁴⁵ See 31 U.S.C. § 1105(b) (1994).

⁴⁶ See Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996).

⁴⁷ *Statement Before the Sen. Comm. on Governmental Affairs and the House Comm. on Government Reform and Oversight*, 104th Cong. (1995) available in 1995 WL 10418 (statement of Gilbert S. Merritt, Chief Judge of the Sixth Circuit and Chairman of the Executive Comm. of the Judicial Conference of the United States).

⁴⁸ See generally Jean Christensen, *Federal Judges Oppose Line-Item Veto*, ASSOC. PRESS, Mar. 26, 1996, available in 1996 WL 4418359 (noting that since executive branch is most frequent litigant in federal courts, it should not decide budgetary issues of judicial branch).

threats emanate from heated political discourse or from our system of divided government, the public and the organized bar, as well as elected officials, must be alert to the dangers and must—as a matter not only of civic duty but also, in the long run, of sheer self-interest—take whatever steps are necessary to preserve one of the most valued, and envied, aspects of our government.