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**THE CONSTITUTIONAL AND HISTORICAL
ORIGINS OF JUDICIAL INDEPENDENCE:
TESTIMONY OF LOUIS H. POLLAK BEFORE
THE COMMISSION ON SEPARATION OF
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OCTOBER 11, 1996**

HONORABLE LOUIS H. POLLAK*

Mr. Chairman, I know I speak for Professor [Stephen] Burbank [of the University of Pennsylvania Law School] as well as for myself in expressing our great gratification at the privilege of appearing before this Commission, which certainly has a very important mission and agenda laid out for it, as the carefully crafted remarks of Mr. Shestack [Jerome J. Shestack, President-elect of the American Bar Association] have so clearly indicated.

Professor Burbank and I are charged, as we understand it, with undertaking to present a kind of preliminary view of the historical framework within which these very serious questions of judicial independence — what is it? what is it for? what is its scope? — are to be examined by you.

The way we have marked out our work for you is that I am to go back into our early history, back to 1787 and 1789, and talk about the first couple of decades, and then Professor Burbank, who moves at much greater speed than I, will bring you forward from approximately the Madison presidency to the present day. . .

Now, Mr. Shestack properly took us back to what [Alexander] Hamilton said in *The Federalist Papers*.¹ That, of course, flows very directly from the discussions, though less focused than Ham-

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The testimony which I presented to the Commission on Separation of Powers and Judicial Independence was *ex tempore*. In the *St. John's Journal of Legal Commentary*, I have edited the testimony very slightly in order to render it reasonably intelligible. The footnotes which follow are not my work; they are the work of the editors of the *Journal* who felt that it would be useful if the testimony which I presented were supported by some modicum of appropriate scholarly apparatus. Needless to say, I am most grateful to the editors for their efforts to ornament the testimony with an aura of academic respectability.

¹ THE FEDERALIST (Alexander Hamilton).

ilton may have made them appear to be, in the Constitutional Convention itself.²

I won't undertake to rehearse in any detail what Hamilton had to tell us in *The Federalist Papers* because it is well known, I think, to all of us.³ But, basically, I suggest that it is of some interest that, in laying out the basic propositions about permanency in office and the necessity for judges to be assured a compensation that would not be diminished, Hamilton . . . addressed those issues first before he went on to tell his readers what it was that the federal judges were supposed to do, and that seems to me a kind of intriguing way to make up a job description. . .⁴

Why did Hamilton proceed in that fashion? I think the answer may be that he immediately tied the principles of permanency in office and the others that go along with it, such as those having to do with compensation, to the necessity of such protections for the judicial office in a judicial system which is going to have the power of judicial review. Hamilton referred to this as judges engaged in the judicial work of enforcing a "limited Constitution."⁵

And then Hamilton went on to announce and defend the process of judicial review — which is, of course, nowhere specified in the Constitution's text — in a fairly elaborate way.⁶ So one, I think, can surmise that Mr. Hamilton's real preachment was, this is what we expect our judges to be doing, watching out for legislatures that may get too full of themselves and start passing unattractive laws.⁷

However that may be, Hamilton certainly laid out very clearly what the conditions are that will insulate the judiciary from the executive and the legislature,⁸ recognizing, as Mr. Shestack

² See generally CHRISTOPHER COLLIER & JAMES LINCOLN COLLIER, *DECISION IN PHILADELPHIA 202-04* (1986) (discussing scope of judiciary's power); MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 155-65* (1913) (describing debates over judiciary).

³ See *THE FEDERALIST* NOS. 78-83 (Alexander Hamilton) (detailing role judiciary would play under new government).

⁴ See *THE FEDERALIST* NOS. 78, 79 (Alexander Hamilton) (reciting how judges are to be appointed, tenured, and compensated).

⁵ See *THE FEDERALIST* NO. 78, at 396 (Alexander Hamilton) (Everyman's Library 1965) (noting that "[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution").

⁶ See *id.* at 397 (stating that Constitution is "fundamental law" and it is within judicial power to determine whether Legislative or Executive acts violate Constitution).

⁷ See *id.* at 398 (providing that judges have duty to ensure that laws passed do not contradict Constitution).

⁸ See *id.* at 399-400. Hamilton argues judicial independence is essential to allow judges to be unaffected by societal forces. *Id.*

pointed out, that Hamilton identified “the judiciary [as the] least dangerous” branch of government because, having “no influence over either the sword or the purse . . . [i]t may truly be said to have neither FORCE nor WILL, but merely judgment.”⁹

Now, in thinking about what problems build from Hamilton’s classic formulation, I suggest that it probably is useful to go forward from 1787-1789, when the process of ratification was going on — the process that Hamilton and Madison and Jay were trying to promote in *The Federalist Papers* — to what I suggest was the first major crisis in the history of the federal judiciary in our history, which was the period commencing in 1801 running for perhaps the next three or four years.

It seems to me appropriate to connect the problem of impeachment, as it came to a culmination in the attempted removal of Justice Chase, and the problem of reorganizing the judiciary including, among other features, the elimination of existing courts.

In 1801, we may remember, the departing Adams administration thought to perpetuate itself in some limited authority, since it wasn’t any longer going to dominate the executive or legislative branches, by entrenching Federalists in that “least dangerous” branch. And one step to accomplish this was to pass legislation which enlarged enormously the jurisdiction of the federal courts so as to make that jurisdiction almost coextensive with the constitutional grant, as opposed to keeping it, at least at the trial level, primarily diversity and admiralty jurisdiction. The legislation¹⁰ also eliminated what had been an incubus, the circuit-riding responsibilities of the Supreme Court Justices. But the center-piece of the Adams administration’s legislation was the restructuring of what the Constitution denominates the “inferior [federal] courts” so as to provide for sixteen circuit judgeships. By no coincidence all of the sixteen worthies nominated by President Adams and confirmed by the Senate were of the Federalist political persua-

⁹ See *id.* at 395. Hamilton also opines that, of the three branches, the judiciary “will be least in a capacity to annoy or injure [the political rights of the Constitution].” *Id.*

¹⁰ See Federal Judiciary Act of 1801 (creating new circuit courts and sixteen circuit court judgeships for President Adams to fill); see also Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 993 SUP. CT. REV. 329, 350-51 (1993) (describing details of Act); Kathryn Turner, *Federalist Policy and the Judiciary Act of 1801*, 22 WM. & MARY L.Q. 3, 32 (1965) (expounding on key aspects of Act). See generally GEORGE L. HASKINS & HERBERT A. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL 1801-15, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 183-86 (1981) (detailing Court’s reaction to Judiciary Act of 1801).

sion — including, I may say, quite a number of lawyers highly qualified for their office, notwithstanding that at that time judicial nominations were not scrutinized by the American Bar Association.

When Mr. Jefferson's party came into power, the first thing on their agenda was to jettison that legislation, which they did, and essentially restored the judiciary to the structure set up in 1789 both as to organization and as to jurisdiction and, indeed, as to Supreme Court Justices' circuit-riding.¹¹

That clearly generated some rather significant questions for the newly-appointed Federalist judges. What about their jobs? They were appointed to and confirmed in and commissioned with positions of life tenure — or, to use the constitutional term, "good behavior." But good behavior, it turned out, seemed only to last for about a year and the new Congress had turned them out. Had something unconstitutional happened?

There was that rather significant problem and there were associated problems. Could Congress shuffle and reshuffle the jurisdiction of the trial courts? And did Congress have authority to require Supreme Court Justices to ride circuit? Congress had done it before, but then the Justices had been relieved of that duty briefly and none of them was eager to resume it.

The first set of problems was generated by the Jefferson Congress' (1) repeal of the Adams Congress' court-reorganization legislation and (2) restoration of the old order. Was that constitutional? That was settled in 1803 when two things happened:

First, the judges piteously appealed to Congress with a long and well-drawn petition explaining how they had these fine positions and now they seemed to be removed and what was Congress going to do about it? The answer was: nothing.

Next, there was the question whether the Supreme Court was going to accept the repeal? That issue came to the Supreme Court in the almost forgotten case of *Stuart v. Laird*,¹² a case decided, it is to be noted, only six days after a case called *Marbury v.*

¹¹ See Act of Apr. 29, 1802, § 4, 2 Stat. 156, 157-58. This Act was Jefferson's statutory reaction to the Judiciary Act and succeeded in repealing all aspects of it. *Id.*; Alfange, *supra* note 10, at 350-60. The author describes Jefferson's reaction and attempt to repeal the Act when he became President. *Id.*

¹² 5 U.S. (1 Cranch) 299 (1803).

Madison,¹³ was decided. And the Supreme Court, in a very brief three-paragraph opinion by Justice Paterson, affirmed the order of the judge who had decided the case below — Chief Justice Marshall, sitting on circuit — dismissing the constitutional challenge.¹⁴ The Supreme Court evidently felt that the path of prudence, as well as the path of constitutional interpretation, lay in acknowledging that Congress' Article III power to "ordain and establish" the "inferior courts" included a power to disestablish such courts. Article III seems to posit the Supreme Court as the single unalterable tribunal in the structure.¹⁵

I think it's fair to say that *Stuart v. Laird*¹⁶ was the litigation that was most talked about and rather fearfully apprehended by the Jeffersonians in 1803. *Marbury v. Madison*,¹⁷ was a minor irritant, at least until it was decided. I think, at the time, the politicians and the bar generally were much more concerned with the issues posed in *Stuart v. Laird*,¹⁸ and the Supreme Court took the role of convenient deferral to the legislative branch.

Now, implicit in *Stuart v. Laird* — but not explicit and not really generated by the issues in that litigation — were questions which remain with us today; questions as to the authority of Congress not merely to rearrange courts, but to withdraw jurisdiction from courts on a selective basis that might be thought to be a legislative attempt to determine the outcomes, or preclude outcomes entirely, in certain kinds of litigation. Those questions became very much alive in the post-Civil War era when Congress was afraid that the Court was going to strike down much of the Reconstruction legislation; we recall in that connection the *McCardle*¹⁹

¹³ 5 U.S. (1 Cranch) 137 (1803).

¹⁴ See *Laird*, 5 U.S. (1 Cranch) at 308-09 (citing Congress' power and Supreme Court justices inability to sit as circuit judges as reasons for reversal).

¹⁵ See *id.* at 309. "Congress have constitutional authority to establish, from time to time, such inferior tribunals as they may think proper: and to transfer a cause from one such tribunal to another." *Id.* Justice Paterson continued that:

The judges of the supreme court have no right to sit as circuit judges, not being appointed as such, or in other words, that they ought to have distinct commissions for that purpose. To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, afford an irresistible answer, and have indeed fixed the construction.

Id.

¹⁶ 5 U.S. (1 Cranch) 299 (1803).

¹⁷ 5 U.S. (1 Cranch) 137 (1803).

¹⁸ 5 U.S. (1 Cranch) 299 (1803).

¹⁹ *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 325-27 (1867) (ruling that federal courts have jurisdiction over decisions of military commissions under Reconstruction Acts).

case. And only this year, at the very end of the last term of the Court, we find the Supreme Court returning to those questions in *Felker v. Turpin*,²⁰ sustaining a portion of the anti-terrorism legislation that, among other things, drastically reduces the scope of *habeas corpus*.²¹

In *Felker*, the Court was satisfied that no constitutional issue was raised by the reduction of its authority to review certain categories of lower-court *habeas corpus* judgments because the Court retained its general power to issue what are called, somewhat anomalously, "original" writs of *habeas corpus*.²² So those issues remain very much alive today.

In reviewing the court-related problems of the Jeffersonian presidency, in addition to considering issues related to the reorganization of the courts, we have to look back at what happened on the impeachment front. The Jeffersonians were handed an initial opportunity, which they seized, to try to utilize the impeachment process as a mechanism for getting rid of those Federalist judges who were perceived as particularly hostile to the policies of the Jefferson administration. That initial opportunity consisted of the very sad case of District Judge John Pickering of New Hampshire, who was apparently insane, and who became an alcoholic as well in his declining years of mental debility. In an unedifying spectacle the ill judge was impeached by the House and convicted by the Senate.²³

Energized by their success with Pickering, the Jeffersonians went ahead to try to impeach Justice Samuel Chase, who, as a bitter-end Federalist, was an obvious target. Had it turned out that Chase could be removed, the next and larger target would likely have been Jefferson's cousin - and enemy — John Marshall. But, as we all know, although the House impeached Chase, the Senate, by a narrow margin, declined to convict. The received

²⁰ 116 S.Ct. 2333 (1996).

²¹ *Id.* at 2340 (upholding statute that limits state prisoners *habeas corpus* petitions to federal courts).

²² *See id.* at 2338-39 (holding that court still has power to hear original writs of *habeas corpus*).

²³ *See* ELEANORE BUSHNELL, CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS 43-55 (1992) (depicting successful impeachment of deficient and alcoholic Judge Pickering); *see also* HASKINS, *supra* note 10, at 217-19 (detailing impeaching process of Judge Pickering); Wilfred Feinberg, *Constraining 'The Least Dangerous Branch': The Tradition of Attacks on Judicial Power*, 59 N.Y.U. L. REV. 252, 256 (1984) (describing Pickering as mentally incompetent and alcoholic).

view is that Justice Chase was being pursued for political reasons, though many of the charges against him related to his conduct on the bench, and the failure to convict was regarded as a defeat for those who thought that impeachment could serve purposes that in English law frequently had been accomplished by measures of address in Parliament to get rid of judges who were simply unpopular with the prevailing political regime.

Only this last spring, in April of this year, Chief Justice Rehnquist, in a lecture at American University,²⁴ noted the Chase proceedings and said that the acquittal of Justice Chase provided “assurance to federal judges that their judicial acts, their rulings from the bench, would not be a basis for removal from office by impeachment and conviction, and that has been the guiding principle of the House of Representatives and the Senate from that day to this.”²⁵

The aspect of protecting judges from withdrawals of compensation has happily not been a major issue. There have been a couple of curious side shows, as when the Supreme Court early in this century briefly concluded that the imposition of income taxes on federal judges violated their entitlement to a protected compensation.²⁶ But, happily, that precedent has been substantially diluted.²⁷

I think you know that just this week the Supreme Court found itself unable to review a decision of the Federal Circuit which held that federal judges who had been in office before 1983 could not constitutionally be required to pay Social Security taxes imposed subsequent to their appointment to the bench.²⁸ That decision of the Federal Circuit was affirmed by the Supreme Court for the reason that four members of the Supreme Court found themselves disqualified — presumably, by financial interest — from partici-

²⁴ See William Rehnquist, *Symposium: The Future of the Federal Courts*, 46 AM. U. L. REV. 263 (1996) (discussing federal judicial system in America).

²⁵ *Id.* at 273.

²⁶ See *Evans v. Gore*, 253 U.S. 245, 255-57 (1920) (citations omitted) (holding that Congress' ability to impose income tax on federal judiciary would encroach upon judicial independence).

²⁷ See *O'Malley v. Woodrough*, 307 U.S. 277, 281 (1939) (allowing Congress to tax judiciary so long as it was non-discriminatory); see also *Beer v. Commissioner of Internal Revenue*, 64 T.C. 879, 881-84 (1975) (upholding income tax on federal judge).

²⁸ See *Hatter v. United States*, 64 F.3d 643, 649-52 (D.C. Cir. 1995) (ruling that withholding of social security taxes from salaries of Article III judges who took office before social security taxes were imposed diminished their compensation in violation of Constitution's compensation clause), *aff'd mem.*, 117 S. Ct. 39 (1996).

pating, and the remaining five Justices did not form a quorum. So the decision of the Federal Circuit — to which I mean no disrespect in suggesting that there might have been other ways of deciding that case — has been affirmed with no precedential force, as if by an equally divided Court.²⁹

Before belately turning the lectern over to Professor Burbank, let me briefly refer to two other items that I think may be worth recalling from the 1790s. In *Hayburn's Case*, the Justices declined as judges to take on the duty of reviewing Revolutionary War pension applications. They declined as judges to perform that office because, as judges, they felt they could not make determinations which would then be reviewable, as the statute called for, by the Secretary of War.³⁰ That would destroy the finality of judicial disposition that the Justices felt was required of the judicial office.³¹

That easy conclusion suggested, but left unanswered, questions that remain unanswered to this very day of the extent to which Congress can provide for the rearrangement of determinations made by the federal judiciary. Conceptually the proposition is that a final judgment cannot be altered or modified in any way by any subsequent legislative enactment, though, of course, Congress is free to lay down new rules of law for the future.³² I refer you to the most recent preachment of the Supreme Court on these matters in *Plaut v. Spendthrift Farms*,³³ in which, speaking through Justice Scalia, seven justices found unconstitutional a congressional attempt in 1991 to overturn the effects of a 1991 Supreme Court decision determining what the statute of limitations should be in § 10(b)(5)³⁴ actions.³⁵ Congressional action to require the reinstatement of decisions of cases which had been dismissed by vir-

²⁹ See *id.* at 39 (declaring that decision has same effect as if it was made by equally divided court).

³⁰ See *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410-411 (1792) (ruling that allowing Secretary of War, or any other Executive or Legislative official to review decisions of courts violated Constitution).

³¹ See *id.* at 411-12 (asserting federal courts need to be independent of other branches to be successful).

³² See U.S. CONST. art. III, § 3. "In all other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." *Id.*

³³ 115 S. Ct. 1447 (1995).

³⁴ See Securities Exchange Act of 1934 § 27A, 15 U.S.C. 78 (1991); Rule 10b-5, 17 C.F.R. § 240 (1994).

³⁵ See *Plaut v. Spendthrift Farms*, 115 S. Ct. 1447, 1453-56 (1995) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)) (holding that Congress' attempt to overrule Supreme Court decision was unconstitutional).

tue of the Supreme Court's 1991 ruling was found by the Court in *Plaut* to be unconstitutional.³⁶

In the 1790s, the Court also made it plain that it could not be in the business of giving legal advice to the administration. They turned back Mr. Jefferson's request, on behalf of President Washington, that the Justices advise the President about the neutrality doctrines that would be important for the executive to have in mind in dealing with the difficulties presented by the pending warfare between Britain and France. The Justices reminded the President that the Constitution provided that he could ask his principal executive officers for advice; notwithstanding their great respect for the Presidency and the President, the Justices felt that it was not consistent with the separation of powers for judges to be advising the President.

The last thing I would mention of our early history is the decision by the Supreme Court in 1812, then reaffirmed in 1816, that there was no such thing as a federal common law of crimes.³⁷ The Court was withdrawing from an arena in which quite conceivably it would find itself in competition with the legislature. It was a part of the security blanket of non-pretension, except where absolutely critical, as the Court found it to be in *Marbury v. Madison*,³⁸ that characterized the Court in those very early days of defining the role of federal judges.

³⁶ See *id.* at 1477 (stating that Supreme Court has last word on judicial decision, thus Congress can not change judicial decision by passing legislation that applies retroactively).

³⁷ See *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 215 (1821) (ruling that there is no such thing as federal common law of crimes).

³⁸ 5 U.S. (1 Cranch) 137 (1803).

