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WHEN CONGRESS ATTACKS THE FEDERAL COURTS

Mark C. Miller[†]

I would like to begin by thanking the organizers of this wonderful conference on judicial independence for inviting me to comment on the excellent paper presented by Professors Entin and Jensen.¹ This paper tells us a great deal about issues surrounding tax legislation and the Compensation Clause. It is certainly possible that Congress might attempt to attack the courts through the use of tax legislation, and the Compensation Clause is certainly one device designed to protect the courts from such attacks. Clearly, the Compensation Clause helps ensure judicial independence. I think Professors Entin and Jensen have given us a strong examination of the intersection of tax law and the Compensation Clause. Nevertheless, I would like to broaden the discussion to cover various ways in which Congress can attack the federal courts when the legislative branch is unhappy with the decisions of the judicial branch. Specifically, Congress can use its compensation power, appropriation power, and impeachment power to demonstrate Congress's disapproval of a judicial decision.

I agree with Professors Entin and Jensen that the Supreme Court, in *United States v. Hatter*,² stated that judges should pay nondiscriminatory taxes just like all other citizens. These nondiscriminatory taxes do not raise Compensation Clause issues. As the Court stated in *Hatter*, "In practice, the likelihood that a nondiscriminatory tax represents a disguised legislative effort to influence the judicial will is virtually nonexistent."³ I also agree that the Court attempted to settle the constitutional question that discriminatory taxes would violate the Compensation Clause. It is

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¹ Jonathan L. Entin & Erik M. Jensen, *Taxation, Compensation, and Judicial Independence*, 56 CASE W. RES. L. REV. 965 (2006).

² *United States v. Hatter*, 532 U.S. 557 (2001).

³ *Id.* at 571.

worth repeating the statement written by Justice Breyer for the Court: "In our view, the Clause does not prevent Congress from imposing a 'non-discriminatory tax laid generally' upon judges and other citizens, but it does prohibit taxation that singles out judges for specially unfavorable treatment."⁴ In other words, the Compensation Clause, according to the Court, prevents Congress from imposing discriminatory taxes on federal judges. Where I disagree with Professors Entin and Jensen, however, is that the Supreme Court has issued the last word on the subject. Although it seems highly unlikely, I do think it is possible that Congress could refuse to accept the Court's pronouncement that tax legislation specifically aimed at federal judges is unconstitutional. It may be an extremely remote possibility, but I believe that someday a determined majority in Congress might attempt to use the tax laws to punish federal judges with whom they disagree.

The Entin and Jensen paper is a very important example of a relatively new field of scholarship that examines the interactions among the political institutions, and especially the interactions between the federal courts and other bodies.⁵ I do not believe that the federal courts can be understood in isolation, but instead scholars must attempt to understand the relationships between and among the institutions of government. Two scholars have articulated:

As a matter of constitutional design, the United States simply does not feature a hierarchy of lawmakers or compartmentalized niches for each branch of government. Instead, the U.S. Constitution creates a system of overlapping and diversely representative branches of government, which share and compete for power.⁶

⁴ *Id.* at 561 (citing *O'Malley v. Woodrough*, 307 U.S. 277, 282 (1939)).

⁵ See JEB BARNES, *OVERRULED? LEGISLATIVE OVERRIDES, PLURALISM, AND COURT-CONGRESS RELATIONS IN AN AGE OF STATUTES* (2004); *CONGRESS AND THE CONSTITUTION* (Neal Devins & Keith E. Whittington eds., 2005); *CONGRESS CONFRONTS THE COURT* (Colton C. Campbell & John F. Stack, Jr. eds., 2001); LOUIS FISHER, *CONSTITUTIONAL DIALOGUES* (1988); *JUDGES AND LEGISLATORS* (Robert A. Katzmann ed., 1988); GEORGE I. LOVELL, *LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY* (2003); *MAKING POLICY, MAKING LAW* (Jeb Barnes & Mark C. Miller eds., 2004); J. MITCHELL PICKERILL, *CONSTITUTIONAL DELIBERATION IN CONGRESS* (2004).

⁶ Jeb Barnes & Mark C. Miller, *Governance as Dialogue*, in *MAKING POLICY, MAKING LAW*, *supra* note 5, at 202.

Or put more simply, as Richard Neustadt has argued, in reality, in our system of government, we have “separated institutions sharing powers.”⁷

I am a strong advocate of the governance as dialogue school of thought that says that the Supreme Court does not necessarily have the final say on issues of constitutionality.⁸ Instead, I agree with William Eskridge⁹ and others that one could think of the relationship among the federal courts, the Congress, and the executive as a multi-player game in which no institution has the “last word,” but that issues of constitutionality play themselves out in a continuous colloquy or dialogue. As Louis Fisher has argued, “An open dialogue between Congress and the courts is a more fruitful avenue for constitutional interpretation than simply believing that the judiciary possesses superior skills and authority.”¹⁰ In a different work, Fisher has also expressed his belief that, “Although the Supreme Court periodically announces that it has the ‘final word’ on constitutional law, the reality has always been quite different.”¹¹ Fisher argues that scholars should explore not only how the courts interact with Congress, but also with the President, executive branch agencies, the states, interest groups, the legal academic community, and the public at large.¹² Thus, although the Supreme Court may appear to give final rulings on such issues as to whether the Compensation Clause allows discriminatory taxes against federal judges, the reality is that the process of determining constitutionality is not that simple.

The relationship between Congress and the federal courts is certainly highly complex and often strained. In fact, at the beginning of the twenty-first century we may be experiencing one of the greatest periods of conflicts between Congress and the courts. As Chief Justice Rehnquist stated in his 2004 Annual Report, “Criticism of judges has dramatically increased in recent years, exacerbating in some respects the strained relationship between the Congress and the federal

⁷ RICHARD E. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP FROM FDR TO CARTER* 26 (1980).

⁸ See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH OF GOVERNMENT: THE SUPREME COURT AT THE BAR OF POLITICS* 240 (1962).

⁹ See, e.g., William N. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331 (1991) (analyzing the effects of Congress’s ability to override Supreme Court decisions); William N. Eskridge, *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 *CAL. L. REV.* 613 (1991) (discussing the roles of the President and the Supreme Court in statutory interpretation and how these roles affect statutory policy).

¹⁰ LOUIS FISHER, *AMERICAN CONSTITUTIONAL LAW* 1051 (6th ed. 2005).

¹¹ Louis Fisher, *Judicial Finality or an Ongoing Colloquy?*, in *MAKING POLICY, MAKING LAW*, *supra* note 5, at 153.

¹² FISHER, *supra* note 10, at 1023; see also, Stuart S. Nagel, *Court-Curbing Periods in American History*, 18 *VAND. L. REV.* 925 (1965).

judiciary.”¹³ Other eras of high tension between Congress and the federal courts have included the 1858–1869 period,¹⁴ the early part of the 1900s,¹⁵ the 1930s,¹⁶ and the late 1950s.¹⁷ In fact, following the Civil War, the Radical Republicans in Congress enacted a statute to require a two-thirds majority of the Court before the justices could declare any federal statute unconstitutional. They were attempting to protect the Reconstruction Acts from being struck down as unconstitutional. Progressives in the early part of the twentieth century also proposed requiring a two-thirds vote of the justices of the Supreme Court before the Court could declare a congressional statute to be unconstitutional, and they proposed that a two-thirds vote in Congress could override Supreme Court constitutional decisions.¹⁸

But the current period may be the most contentious in the relationship between the courts and Congress. As Lyle Denniston, who has been a journalist covering the Supreme Court for many years, has said recently, “In 56 years of journalism, most of which has been spent hanging around lawyers and courthouses, I have never experienced the depth of venom that now flows around the relationship between the branches of government, particularly around the judiciary.”¹⁹ Similarly, Justice Sandra Day O’Connor in 2004 echoed that the relationship between Congress and the federal courts was “more tense than at any time in my lifetime.”²⁰

¹³ WILLIAM H. REHNQUIST, 2004 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4 (2004), available at <http://www.supremecourtus.gov/publicinfo/year-end/2004year-endreport.pdf>.

¹⁴ See Nagel, *supra* note 12. The 1858–1869 tensions reflected the congressional reaction to the *Dred Scott* decision and congressional efforts to prevent the Court from declaring the Reconstruction to be unconstitutional. See, e.g., *Scott v. Sandford*, 60 U.S. 393 (1857).

¹⁵ In the 1900s, Progressives were angry at the conservative judicial activism of the Court in reading laissez-faire economics into the Constitution and thus striking down most attempts at governmental regulation of the economy. Nagel, *supra* note 12. In fact, Senator Robert M. LaFollette referred to federal judges at the time as “petty tyrants and arrogant despots.” GARY L. MCDOWELL, *CURBING THE COURT* 1 (1988).

¹⁶ In this era, FDR and the Congress were angry that the New Deal was being declared unconstitutional. Nagel, *supra* note 12; see also JOHN R. SCHMIDHAUSER & LARRY L. BERG, *THE SUPREME COURT AND CONGRESS, 1945–1968*, at 134–42 (1972) (discussing Roosevelt’s proposed court-packing plan and its potential political backlash).

¹⁷ During the late 1950s, conservatives were upset with Supreme Court decisions dealing with desegregation, congressional investigations, national security, and other issues. Nagel, *supra* note 12; see also LUCAS A. POWE JR., *THE WARREN COURT AND AMERICAN POLITICS* 127–205 (2000) (providing an in-depth discussion of attempted Congressional anti-court bills during the late 1950s).

¹⁸ DAVID M. O’BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 357–58 (6th ed. 2003).

¹⁹ Colloquium, *The Courts, the Legislature, and the Executive, Separate and Equal? Issues at the Federal Level*, 87 JUDICATURE 220, 221 (2004).

²⁰ Linda Greenhouse, *Rehnquist Resumes His Call for Judicial Independence*, N.Y. TIMES, Jan. 1, 2005, at A10.

Part of this tension between the courts and Congress may be due to the fact that the Rehnquist Court practiced both liberal judicial activism and conservative judicial activism²¹ simultaneously, leading to what Keck has labeled, *The Most Activist Supreme Court in History*.²² In fact, from 1995–2003, the Court struck down federal statutes at a rate higher than in any other period in U.S. history.²³ The conflicts between Congress and the courts are not new, but the current period seems to be accentuating these tensions. Since I do not believe that the Supreme Court always has the last word on constitutional issues, it is important for the Court to appreciate the potential institutional dangers that can come from an angry Congress. Again, Louis Fisher has written that,

Throughout its history, the Supreme Court has understood that its “independence” relies on an astute appreciation of how dependent the judiciary is on the political system for understanding, supporting, and implementing judicial rulings. The Court has an opportunity to exercise leadership and creativity, but the risk of a political backlash is always around the corner.²⁴

The courts and Congress have different institutional cultures, different institutional needs, and different institutional wills.²⁵ Many of

²¹ When political scientists use the term “judicial activism,” they tend to use the term as a descriptive term and not generally as a pejorative. For political scientists, judicial activism simply means that the courts make public policy when the elected branches cannot or will not. As Holland defines it,

Judicial activism comes into existence when courts do not confine themselves to adjudication of legal conflicts but adventure to make social policies, affecting thereby many more people and interests than if they had confined themselves to the resolution of narrow disputes. The activism of a court, thus, can be measured by the degree of power that it exercises over citizens, the legislature, and the administration.

Kenneth M. Holland, *Introduction*, in JUDICIAL ACTIVISM IN COMPARATIVE PERSPECTIVE 1, 1 (Kenneth M. Holland ed., 1991).

Judicial activism in the U.S. context also means that the judges are willing to interpret the U.S. Constitution as a living and changing document. Thus, any time that the American courts declare an action of the elected branches to be unconstitutional, they are exercising judicial activism in the political science sense of the term. The ideological direction of the activism leads to the labeling of the action as either liberal judicial activism or conservative judicial activism. THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY* (2004).

²² KECK, *supra* note 21.

²³ *Id.* at 40.

²⁴ Fisher, *supra* note 11, at 153.

²⁵ See Mark C. Miller, *The View of the Courts from the Hill: A Neoinstitutional Perspective*, in MAKING POLICY, MAKING LAW, *supra* note 5, at 53 (describing these different wills in terms of both individual and institutional behaviors) [hereinafter, Miller, *The View of the Courts*]; Mark C. Miller, *Interactions Between Legislatures and Courts*, 87 JUDICATURE 213, 213 (2004) (arguing that this produces conflict because each branch “misunderstands the needs, the views, and the institutional realities of the other”).

the interactions between the courts and Congress are positive in nature,²⁶ but others are more conflictual. Judges see themselves as an independent and coequal branch of government, but sometimes Congress views the courts as just one more federal agency begging for money and other resources, as will be discussed in more detail later in the article. Thus, the two institutions often just do not understand how and why the other makes decisions. As Davidson and Oleszek note, "Communications between Congress and the federal courts are less than perfect. Neither branch understands the workings of the other very well."²⁷ This lack of communication between the branches is clearly a problem for our political system. Judge Robert A. Katzmann remind us of what political scientists have been saying for years: "Governance . . . is premised on each institution's respect for and knowledge of the others and on a continuing dialogue that produces shared understanding and comity."²⁸ And as Michael H. Armacost, former president of the Brookings Institution, has written, "The judiciary seeks an environment respectful of its independence. Congress seeks a judicial system that faithfully construes the laws of the legislative branch and efficiently discharges justice."²⁹

I. CONGRESS'S COMPENSATION POWER

There have been many instances in which Congress has used various mechanisms to attack the federal courts for decisions with which a determined legislative majority has disagreed.³⁰ While to my knowledge Congress has not yet deliberately defied the protections inherent in the Compensation Clause, the legislative branch has used other means to attack the courts and to attempt to influence court decisions. Even though the Compensation Clause prevents Congress from reducing any judicial salaries that have already vested,³¹ the clause neither requires Congress to provide any annual cost of living

²⁶ See, e.g., Colloquium, *supra* note 19, at 221 (noting positive examples of the three branches working together); Judith Resnik et al., *The Independence of the Federal Judiciary*, BULL. AM. ACAD. ARTS & SCI, Winter 2004, at 22; Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000) [hereinafter Resnik, *Trial as Error*].

²⁷ ROGER H. DAVIDSON & WALTER J. OLESZEK, CONGRESS AND ITS MEMBERS 343 (8th ed. 2002).

²⁸ ROBERT A. KATZMANN, COURTS AND CONGRESS 1 (1997).

²⁹ *Id.* at vii.

³⁰ It is interesting to note that members of Congress with law degrees tend to be more supportive of the courts than are the nonlawyer members. See MARK C. MILLER, THE HIGH PRIESTS OF AMERICAN POLITICS: THE ROLE OF LAWYERS IN AMERICAN POLITICAL INSTITUTIONS (1995).

³¹ See *United States v. Will*, 449 U.S. 200 (1980).

adjustments for federal judges nor prevents Congress from canceling future announced judicial salary increases.³² Thus, judicial salaries have always been a point of contention, and Congress has sometimes used judicial salaries to send a clear message to the courts. For example, in 1964, Congress increased the salaries for lower federal judges by \$7,500 per year but increased the salaries for Justices of the U.S. Supreme Court by only \$4,500 per year. As Schmidhauser and Berg explain, “The \$3,000 differential clearly reflected a direct Congressional reprimand to the Supreme Court. This crude rebuff clearly stemmed from congressional dissatisfaction with several controversial decisions rendered by the Court.”³³

Clearly, judicial salary issues have added to the tensions between the courts and Congress. Federal judges often feel that Congress does not provide adequate compensation for them. As Professor Paul M. Bator has remarked, “federal judges, as a group, complain more about their pay than any other group I have ever encountered.”³⁴ There is probably a great deal of truth to the fact that federal judges feel that they are underpaid. In 2003, Judges Coffin and Katzmann noted that, “Since 1969, federal judicial salaries have lost twenty-four percent of their purchasing power.”³⁵ Various congressional actions regarding annual cost of living adjustments for federal judges have not made federal judges feel better about their financial situations. For example, in 1995, 1996, 1997, and 1999, Congress blocked previously announced “automatic” cost of living increases for various governmental officials, including federal judges, that had been provided for in the Ethics Reform Act of 1989.³⁶ Congress was really attempting to prevent the automatic pay raises for its own members from going into effect, but the legislation blocked federal judicial pay increases as well as the pay raises for legislators. When federal judges sued to

³² “To say that Congress could not alter a method of calculating salaries before it was executed would mean the Judicial Branch could command Congress to carry out an announced future intent as to a decision the Constitution vests exclusively in Congress.” *Id.* at 228; see also *Williams v. United States*, 240 F.3d 1019 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 911 (2002) (examining Congress’s cancellation of annual cost of living increases that were proposed but never vested).

³³ JOHN R. SCHMIDHAUSER & LARRY L. BERG, *THE SUPREME COURT AND CONGRESS* 8 (1972).

³⁴ Paul M. Bator, *The Judicial Universe of Judge Richard Posner*, U. CHI. L. REV. 1146, 1148 (1985).

³⁵ Frank M. Coffin & Robert A. Katzmann, *Steps Towards Optimal Judicial Workways: Perspectives from the Federal Bench*, 59 N.Y.U. ANN. SURV. AM. L. 377, 384 (2003) (citing NAT’L COMM’N ON PUB. SERV., *URGENT BUSINESS FOR AMERICA: REVITALIZING THE FEDERAL GOVERNMENT FOR THE 21ST CENTURY* 22 (2003), available at <http://www.brookings.edu/gs/cps/volcker/reportfinal.pdf>).

³⁶ Ethics Reform Act of 1989, Pub. L. No 101-194, 103 Stat. 1716 (codified as amended in scattered sections of 2, 5, 10, 18, 26, 31 U.S.C.).

recover their blocked “automatic” pay increases, the United States Court of Appeals for the Federal Circuit ruled that the proposed “automatic” pay raises had not vested, and thus, there was no violation of the Compensation Clause in the legislative actions.³⁷ Although the Supreme Court refused to grant certiorari in the case, Justice Breyer wrote a strongly worded dissent to the denial of certiorari, which Justices Scalia and Kennedy joined.³⁸ This concern with judicial salaries and other budgetary resources is not new, of course. Although he was speaking more broadly of his frustration with congressional budgeting practices, Chief Justice Warren stated in 1969 that, “It is next to impossible for the courts to get something from Congress.”³⁹

In his annual year-end reports on the State of the Judiciary, Chief Justice Rehnquist often complained about Congress’s approach to judicial salary issues. In his 2000 Year-End Report on the Federal Judiciary, Chief Justice Rehnquist focused most of the report on what he termed, “the most pressing issue facing the Judiciary: the need to increase judicial salaries.”⁴⁰ The Chief Justice went on to say,

[I]n order to continue to provide the nation a capable and effective judicial system we must be able to attract and retain experienced men and women of quality and diversity to perform a demanding position in the public service. The fact is that those lawyers who are qualified to serve as federal judges have opportunities to earn far more in private law practice or business than as judges. In order to continue to attract highly

³⁷ *Williams*, 240 F.3d at 1019.

³⁸ *Williams v. United States*, 535 U.S. 911 (2002) (Breyer, J. dissenting). Concerning the goals of the Ethics Reform Act of 1989, Justice Breyer wrote:

[T]he Act sought to maintain real judicial compensation at a nearly constant level. The Quadrennial Commission on Executive, Legislative, and Judicial Salaries had told Congress that a continuous inflation-driven reduction in the real level of judicial salaries, at a time when most other real salaries in America had remained constant or increased, was “threatening to diminish the quality of justice in this country. . . .” And the Congressional Bipartisan Task Force on Ethics had added that “Federal judges are resigning at a higher rate than ever before.” Failure to protect against the negative impact of inflation, the task force stated, was “the single, most important explanation” for the increasing disparity between the salaries of high-level Government officials and comparable positions in the private sector. Hence, the Act focused on inflation, assuring federal judges (as well as Members of Congress and high-level Executive Branch officials) that their real salaries, compared to those of the average worker, would decline only slightly, if at all.

Id. at 911-12 (citations omitted).

³⁹ Earl Warren, *Chief Justice Earl Warren’s Address to the Bar Association of the District of Columbia*, WASH. POST, Mar. 16, 1969, at A1, A4.

⁴⁰ WILLIAM H. REHNQUIST, 2000 YEAR-END REPORT ON THE FEDERAL JUDICIARY I (2000), available at <http://www.supremecourtus.gov/publicinfo/year-end/2000year-endreport.html>.

qualified and diverse federal judges—judges whom we ask and expect to remain for life—we must provide them adequate compensation.⁴¹

In a quite lengthy discussion of the subject, the Chief Justice also noted that judicial salary issues had been discussed in thirteen of the last nineteen end-of-year reports on the state of the judiciary.⁴² In his 2002 Annual Report, the Chief Justice reiterated the same sentiment: “At the risk of beating a dead horse, I will reiterate what I have said many times over the years about the need to compensate judges fairly.”⁴³ Judicial salary issues remain important to the Supreme Court and to all federal judges. In his first annual report, Chief Justice Roberts also raised the judicial salary issue:

A more direct threat to judicial independence is the failure to raise judges’ pay. If judges’ salaries are too low, judges effectively serve for a term dictated by their financial position rather than for life. Figures gathered by the Administrative Office show that judges are leaving the bench in greater numbers now than ever before.⁴⁴

II. CONGRESS’S APPROPRIATIONS POWER

More generally, overall appropriations for the judicial branch have been a source of conflict and concern between Congress and the federal courts.⁴⁵ In addition to judicial salaries, the federal courts depend upon Congress for funds for new judgeships, courthouses, staff, technology, and a variety of other purposes. As I have written previously, “The annual appropriations process provides a clear avenue to see the different institutional perspectives of the Supreme Court and of Congress. The courts rightly see themselves as an independent third branch, and many judges seem to resent Congress’s interference with their budget requests.”⁴⁶ Congress, however, often views the federal

⁴¹ *Id.* at II.

⁴² *Id.*

⁴³ WILLIAM H. REHNQUIST, 2002 YEAR-END REPORT ON THE FEDERAL JUDICIARY IV (2002), available at <http://www.supremecourtus.gov/publicinfo/year-end/2002year-endreport.html>.

⁴⁴ JOHN G. ROBERTS, JR., 2005 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3-4 (2005), available at <http://supremecourtus.gov/publicinfo/year-end/2005year-endreport.pdf>.

⁴⁵ See, e.g., BARBARA A. PERRY, *THE PRIESTLY TRIBE: THE SUPREME COURT’S IMAGE IN THE AMERICAN MIND* 144 (1999) (noting that the court started out in the “potato hole”); Harvey Rishikof & Barbara A. Perry, *Separateness but Interdependence, Autonomy but Reciprocity: A First Look at Federal Judges’ Appearances Before Legislative Committees*, 46 *MERCER L. REV.* 667 (1995) (arguing that Justices usually only appear before Congress for budgetary concerns).

⁴⁶ Barnes & Miller, *supra* note 6, at 64.

courts as just one more federal agency begging for funds.⁴⁷ When it comes to the annual appropriations process, it seems that Congress does not consider the fact that the courts are a coequal third branch to be of any significance in its deliberations. As a former chair of the House Appropriations subcommittee with jurisdiction over the budget for the judicial branch explained,

The courts do not have many advocates in Congress. They do not have a constituency. Congress continues to pass more and more laws that require the courts to assume jurisdiction of more cases and add to their workload. Congress is eager to authorize more judges, but when it comes to paying for them, the members of Congress do not think that is a very high priority.⁴⁸

On one small point concerning the appropriations process in Congress, I also disagree with the Entin and Jensen paper. Professors Entin and Jensen seem surprised that Congress might enact certain policies without a clear paper trail.⁴⁹ It is quite easy, however, under current congressional procedures for a member of a conference committee (at least one who is a member of the majority party in the chamber) to add provisions that are difficult to trace. It is quite common for odd riders to be inserted into legislation at the conference committee without any clear paper trail about where the provisions originated or who was the sponsor of the rider.⁵⁰ Such phantom provisions can also be added through creative rules proposed by the House Rules Committee.⁵¹ Therefore, it is not impossible for a member to include legislative language that attempts to influence court decisions without publicly acknowledging that action.

Oleszek, in his seminal work on congressional procedures, confirms that minority party members of the conference committee may have no input into the bargaining and negotiation process in conference committees.⁵² As evidence of the way that the majority party can

⁴⁷ See, e.g., Resnik, *Trial as Error*, *supra* note 26, at 1011.

⁴⁸ NEAL SMITH, MR. SMITH WENT TO WASHINGTON 177 (1996).

⁴⁹ Entin & Jensen, *supra* note 1, at 998.

⁵⁰ WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 255-57 (6th ed. 2003).

⁵¹ DAVIDSON & OLESZEK, *supra* note 27, at 240-44.

⁵² OLESZEK, *supra* note 50, at 255-57. Oleszek even quotes Democratic Senator Richard Durbin (D-Ill.) as stating,

I have been appointed to conference committees in the Senate in name only, . . . where my name will be read by the [presiding officer] and only the conference committee of Republicans goes off and meets, adopts a conference report, signs it, and sends it back to the floor without even inviting me to attend a session.

insert legislative provisions in bills without public scrutiny, especially in conference committees, the Democratic Party's January 2006 lobbying reform plan included proposed changes to the potential secrecy that can happen in the legislative process. As the Washington Post reported,

Under the Democrats' plan, House and Senate negotiators working out final versions of legislation would have to meet in open session, with all members of the conference committee—not just Republicans—having the opportunity to vote on amendments. Legislation would have to be posted publicly 24 hours before congressional consideration.⁵³

Frustration with the annual appropriations process for the courts has created some interesting reactions from federal judges. For example, during the fiscal year 2000 budget cycle, the Senate voted to cut \$280 million from the \$4.3 billion that the federal judiciary had requested that year. In an extraordinary step, Chief Justice Rehnquist sent a letter to the then Senate Majority Leader Trent Lott (R-Miss.), calling the Senate actions "unjustified and impractical."⁵⁴ Many newspapers around the country ran editorials condemning the proposed budget cuts. Eventually, most but not all of the requested funds were approved by the Congress. In some ways, the fiscal year 2004 appropriations process was even more difficult for the federal courts. Congress missed its October 2003 deadline for enacting the judiciary's budget, and when the budget did pass, it included several funding cuts. As Chief Justice Rehnquist described the situation, "The continuing uncertainties and delays in the funding process have necessitated substantial effort on the part of judges and judiciary managers and staff to modify budget systems, develop contingency plans, cancel activities, and attempt to cut costs."⁵⁵ The fiscal year 2005 appropriation for the judiciary was \$5.42 billion, some \$300 million below the request from the third branch.⁵⁶

Id.

⁵³ Jonathan Weisman, *Democrats Unveil Lobbying Curbs; As Party Escalates Reform Push, GOP Calls Scandal Bipartisan*, WASH. POST, Jan. 19, 2006, at A1.

⁵⁴ Richard Carelli, *Rehnquist Lobbies Congress for Money*, ASSOCIATED PRESS NEWSWIRE, Aug. 10, 1999.

⁵⁵ WILLIAM H. REHNQUIST, 2003 YEAR-END REPORT ON THE FEDERAL JUDICIARY I (2003), available at <http://www.supremecourtus.gov/publicinfo/year-end/2003year-endreport.html>.

⁵⁶ Linda Greenhouse, *Rehnquist Resumes His Call for Judicial Independence*, N.Y. TIMES, Jan. 1, 2005, at A10.

Concerns over the annual appropriations process led Chief Justice Roberts to also argue that the independence of the courts is under attack. He wrote in his 2005 annual report, "In recent years, the budget for the federal judiciary and the ever-lengthening appropriations process have taken a toll on the operations of the courts."⁵⁷ The Chief Justice went on to complain about the overly high rents that the judicial branch pays to the federal General Services Administration for courthouses and other office space. He continued, "Escalating rents combined with across-the-board cuts imposed during fiscal years 2004 and 2005 resulted in a reduction of approximately 1,500 judicial branch employees as of mid-December [2005] when compared to October 2003."⁵⁸ At this point, it is worth quoting the new Chief Justice at some length on his views of the intersection of judicial independence and the appropriations process:

The federal judiciary, as one of the three coordinate branches of government, makes only modest requests of the other branches with respect to funding its vital mission of preserving the rule of law under our Constitution. Those of us in the judiciary understand the challenges our country faces and the many competing interests that must be balanced in funding our national priorities. But the courts play an essential role in ensuring that we live in a society governed by the rule of law, including the Constitution's guarantees of individual liberty. In order to preserve the independence of our courts, we must ensure that the judiciary is provided the tools to do its job.⁵⁹

Some politicians are quite open about advocating that the Congress use its power of the purse to influence the decisions of the federal courts. Former House Majority Leader Tom DeLay (R-Tex.) said in the spring of 2005 after the Schiavo controversy,

I have asked the Judiciary Committee to look at the Schiavo case and the actions of the judiciary. . . . The legislative branch has certain responsibilities and obligations given to us by the Constitution. We set the jurisdiction of the courts. We set up the courts. We can unset the courts. We have the power of the purse.⁶⁰

⁵⁷ ROBERTS, *supra* note 44, at 2.

⁵⁸ *Id.* at 3.

⁵⁹ *Id.* at 5.

⁶⁰ Rick Klein, *DeLay Apologizes for Blaming Federal Judges in Schiavo Case*, BOSTON GLOBE, Apr. 14, 2005 at A9.

Some conservatives in Congress had become so angry with a host of what they perceive to be improperly liberal activist decisions of the federal courts and especially the U.S. Supreme Court, that in 2003 they created a new House caucus on judicial accountability. According to a press release issued by the new organization, this new House Working Group on Judicial Accountability will educate members of Congress and the public about judicial abuses, especially judicial activism.⁶¹ Congressman Steve Chabot (R-Ohio), a founding member of the Working Group, defined judicial activism in the following way: "Judicial activism occurs when judges exceed the authority given to them under Article III of the Constitution. When judges substitute their own political views for the law, the ramifications can be felt by communities across our nation."⁶² Former Minority Leader of the House Tom DeLay (D-Tex.) said at the time, "When it comes to judicial abuses, they're going to take no prisoners."⁶³ Founding members of the new Working Group later introduced legislation to require that a two-thirds vote in both houses could override any constitutional decisions of the U.S. Supreme Court that struck down a federal statute as unconstitutional.⁶⁴

III. CONGRESS'S IMPEACHMENT POWER

In addition to using its power of the purse to influence court decisions, some politicians have called for the impeachment of federal judges with whom they disagree. Historically, impeachment has not been used to remove federal judges from the bench merely because a majority of Congress disagrees with a judge's decisions. Impeachment for purely political purposes has been seen as improper since the Senate refused to remove Justice Samuel Chase from the Court in 1803, even though he was impeached by the House as a result of the members' strong opposition to his decisions.⁶⁵ But calls for impeach-

⁶¹ Press Release, Congressman Lamar Smith, Smith & Chabot Form Judicial Accountability Group (July 23, 2003), available at <http://lamarsmith.house.gov/News.asp?FormMode=List&ID=1>.

⁶² *Id.*

⁶³ Administrative Office of the Federal Courts, *Judiciary Under Attack*, 35 THE THIRD BRANCH 8 (2003), available at <http://www.uscourts.gov/ttb/aug03ttb/attack>.

⁶⁴ Congressional Accountability for Judicial Activism Act of 2004, H.R. 3920, 108th Cong. (2004), available at <http://thomas.loc.gov/d108/d108laws.html>; Press Release, Congressman Ron Lewis, Accountability for Judicial Activism Act in the House (Mar. 9, 2004) (on file with Congressman Lewis).

⁶⁵ See WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON (1992); Mary L. Volcansek, *Separation of Powers and Judicial Impeachment*, in CONGRESS CONFRONTS THE COURTS, *supra*

ment of federal judges for purely ideological reasons have grown stronger lately. Following the Schiavo controversy, in which Congress attempted to force the federal courts to prevent the removal of a feeding tube from Ms. Terri Schiavo even though every court that considered the issue ruled that Ms. Schiavo's husband had the right to request removal of the tube, many conservatives called for the impeachment of judges who refused to follow their preferred ideological views. For example, former House Majority Leader Tom DeLay has been quoted as saying, "Judicial independence does not equal judicial supremacy."⁶⁶ He did not rule out impeaching judges, because the current situation depends on "a judiciary run amok."⁶⁷ He continued, "The failure is to a great degree Congress's The response of the legislative branch has mostly been to complain. There is another way, ladies and gentlemen, and that is to reassert our constitutional authority over the courts. . . . This era of constitutional cowardice must end."⁶⁸ Michael Schwartz, then chief of staff to Senator Tom Coburn (R-Okla.), said, "I'm in favor of impeachment," even suggesting that "mass impeachment" of federal judges might be in order.⁶⁹ Conservative activist Phyllis Schlafly even called for the impeachment of conservative U.S. Supreme Court Justice Anthony M. Kennedy for his opinion that the Court should forbid the death penalty for juveniles.⁷⁰ Various other conservative activists at a conference entitled, "Remedies to Judicial Tyranny," organized by a group called Judeo-Christian Council for Constitutional Restoration agreed.⁷¹ Michael P. Farris, chair of the Home School Legal Defense Association, stated at the conference, "If about 40 [federal judges] get impeached, suddenly a lot of these guys would be retiring."⁷² In addition to Congressman Tom DeLay, Senators Rich Santorum (R-Pa.) and John Cornyn (R-Tex.) have not ruled out using impeachment as a tool in order to influence federal court decisions.⁷³ Although stating that he does not support impeachment of federal judges for ideological reasons, House Judiciary Committee Chair F. James Sensenbrenner, Jr. (R-Wis.) has

note 5, at 37.

⁶⁶ Carl Hulse & David D. Kirkpatrick, *DeLay Says Federal Judiciary Has 'Run Amok,' Adding Congress Is Partly To Blame*, N. Y. TIMES, Apr. 8, 2005, at A21.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, WASH. POST, Apr. 9, 2005, at A3.

⁷¹ *Id.*

⁷² *Id.*

⁷³ See Ruth Marcus, *Boot the Bench: There's New Ferocity in Talk of Firing Activist Judges*, WASH. POST, Apr. 11, 2005, at A19.

called for an inspector general to oversee the courts and to conduct investigations into the issue of judges overreaching their constitutional powers.⁷⁴

Such calls for impeachment of federal judges have produced a response from those who worry about threats to the independence of the federal judiciary. The *New York Times* ran an editorial on April 5, 2005, denouncing these attacks on the judiciary. The *Times*' editorial stated, "Through public attacks, proposed legislation, and even the threat of impeachment, ideologues are trying to bully judges into following their political line. Mr. DeLay and his allies have moved beyond ordinary criticism to undermining the separation of powers, not to mention the rule of law."⁷⁵ The *Washington Post* ran an editorial on April 1, 2005, condemning among other things, calls for impeachment of federal judges for ideological reasons. The *Post*'s editorial stated that calls of retribution against judges are "a mark of an arrogant and out-of-control federal power—but that power is the legislature, not the judiciary."⁷⁶ The editorial concluded, "This country has an independent judiciary precisely to shield judges who make difficult decisions under intense political and time pressure from the bullying of politicians."⁷⁷ In his last two end of year reports, Chief Justice Rehnquist repeated his belief that federal judges cannot be impeached for political reasons. After expressing concerns about attempts by Congress to gather information on the sentencing practices of individual judges, in his 2003 year-end report Chief Justice Rehnquist concluded:

For side-by-side with the broad authority of Congress to legislate and gather information in this area is the principle that federal judges are not to be removed from office for their judicial acts. The subject matter of the questions Congress may pose about judges' decisions, and whether they target the judicial decisions of individual federal judges, could appear to be an unwarranted and ill-considered effort to intimidate individual judges in the performance of their judicial duties.⁷⁸

In his final year-end report, Chief Justice Rehnquist concluded,

⁷⁴ Mike Allen, *GOP Seeks More Curbs on Courts: Sensenbrenner Proposes an Inspector General*, WASH. POST, May 12, 2005, at A3.

⁷⁵ Editorial, *Attacking a Free Judiciary*, N.Y. TIMES, Apr. 5, 2005, at A22.

⁷⁶ Editorial, *This Is Not the Way*, WASH. POST, Apr. 1, 2005, at A26.

⁷⁷ *Id.*

⁷⁸ REHNQUIST, *supra* note 55, at II.

No doubt the federal Judiciary, including the Supreme Court, will continue to encounter challenges to its independence and authority because of dissatisfaction with particular decisions or the general direction of its jurisprudence. Let us hope that the Supreme Court and all of our courts will continue to command sufficient public respect to enable them to survive basic attacks on the judicial independence that has made our judicial system a model for much of the world.⁷⁹

IV. CONCLUSION

There are of course other examples of ways that a determined majority in Congress can attack the independence of the federal judiciary. It is beyond the scope of this paper to discuss in detail some of the other mechanisms that could be used by Congress to attack the federal courts. For example, this paper has discussed neither court packing plans, such as those advocated by President Franklin Roosevelt,⁸⁰ nor various plans to prevent federal courts from hearing certain types of cases, commonly referred to as court-stripping proposals.⁸¹ Other actions that Congress could take include proposals to divide up the Ninth Circuit U.S. Court of Appeals in response to the particular ideological path taken by that court.⁸² Certainly, a determined majority in Congress can find other innovative avenues for attacking the courts.

It is clear that the federal courts and Congress have radically different institutional cultures and wills. These different institutional wills and institutional perspectives mean that the two branches usually do not understand the other's decision-making process very well. For the sake of the rule of law, we need to know more about the interactions and relationships between these two governmental bodies. The Entin and Jensen paper takes an important step closer to reaching that level of knowledge.

⁷⁹ REHNQUIST, *supra* note 13, at 8.

⁸⁰ See, e.g., Michael Gerhardt, *The Federal Appointments Process as Constitutional Interpretation*, in CONGRESS AND THE CONSTITUTION, *supra* note 5, at 110; O'BRIEN, *supra* note 18, at 55-64 (discussing President Roosevelt's attempts to pack the Courts with politically compatible justices).

⁸¹ See, e.g., FISHER, *supra* note 10, at 1036-45 (discussing the constitutional arguments in support of and in opposition to various court-stripping proposals); O'BRIEN, *supra* note 18, at 356-60 (examining Congress's threat to remove the Court's jurisdiction over disputes involving states' rights).

⁸² See, e.g., Miller, *The View of the Courts*, *supra* note 25, at 53; Martin Kasindorf, *The Court Conservatives Hate*, U.S.A. TODAY, Feb. 7, 2003, at 3A.