JUDICIAL MISCONDUCT AND DISCIPLINE

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS AND INTELLECTUAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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Mr. COBLE. I thank the gentleman.
Mr. Pilon.

STATEMENT OF ROGER PILON, PH.D., J.D., SENIOR FELLOW AND DIRECTOR, CENTER FOR CONSTITUTIONAL STUDIES, CATO INSTITUTE

Mr. PILON. Yes, thank you, Mr. Chairman, and I'm especially grateful to you, Mr. Chairman, for offering me this opportunity to present what I told your counsel was the third position on this issue of judicial activism.

Mr. COBLE. Well, we're grateful for you all responding. Good to have you with us.

Mr. PILON. In saying that much I have already indicated that I am critical of both the standard conservative position on the issue and the standard liberal position on the issue—indeed, the position that I am about to set forth to you in summary at least is, to my mind, much closer to what the Founders had in mind when they instituted our legal system to begin with.

Now I understand that these hearings have been called to discuss the issue of judicial misconduct and discipline; but the underlying issue, of course, is "judicial activism" and the cry that we have heard about this problem of judicial activism for at least 40 years in this country, but especially of late. I am sympathetic to much of that complaint about judicial activism, but at the same time I do think it's very much overstated, and it is also, more importantly, misstated.

To make my points with respect to those two specific points, however, let me just step back a little bit and look at our system of government generally. We have, indeed, a set of documents to repair to to get a clear picture of what the Framers had in mind when they set this Nation in motion over 200 years ago. With the Declaration of Independence we have the broad moral principles that define us as set forth there, the idea of equality of rights, of individual liberty, and government instituted to secure those rights. We have, then, the Constitution, 13 years later, which was the document through which we reconstituted ourselves, and when we look at the Constitution, the Bill of Rights that was added 2 years later, and in particular, the Civil War amendments, which fundamentally rearranged the structure between the Federal Government and the States, we have a philosophy of government that comes forth that is really striking in its originality, its simplicity, and its intellectual power.

Article 1 sets forth your own powers, the legislative branch, where power is authorized; and, indeed, the very first sentence of article 1 begins, "All legislative power herein granted shall be vested in a Congress." That point is reiterated in the 10th amendment, the final member of the Bill of Rights, which makes it clear that you have only those powers that have been delegated to you by the people, enumerated in the Constitution, and, hence, your power is not only delegated and enumerated, but limited by virtue of that delegation and enumeration.

Article 2 sets forth the power of the executive to enforce that power—those provisions that have flowed from your power.

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PH.D., J.D., SENIOR FELLOW
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Article 3 gives us judicial review, not explicitly, but certainly implicitly, as the Federalist Papers make clear, as *Marbury* v. *Madison* made explicit. Indeed, this power of the judiciary was almost novel at the time. There was, of course, Dr. Bonham's case in 1610 where Lord Cook exercised judicial review, and a few subsequent exercises of it, but it was relatively limited.

Ours was the first true experiment in judicial review, and the role of the judiciary is to oversee the other two branches—to make sure, first, that their power proceeds from authority; second, with respect to the Congress, that when pursuing enumerated ends or powers, that the means chosen be necessary and proper; and third, that the exercise of that power be consistent with the rights that are enumerated in the Constitution, in the Bill of Rights, and subsequently—and with unenumerated rights as well, as the ninth amendment makes clear.

Finally, article 5, if things aren't working out, gives us a way to correct all this through the amendment process.

Now, the point about the judiciary that I just made gives rise to the question: Can they abuse that power? Of course they can. Do they abuse it? Yes, they do. Are there things that can be done about it? Yes, but we have to be extremely careful about what we do.

Let me, then, turn to my central points about overstatement and misstatement. I do believe that the critics of judicial activism have very much overstated the matter. As Congresswoman Lofgren said in her remarks during the last panel, even the *CCRI* case, which is taken to be a blatant example of judicial activism, is one in which Judge Henderson did tie his opinion to a pair of cases. Now, that case is working its way up through the system; it will be reviewed, when it gets to the Supreme Court, if the Supreme Court grants cert. The Court will distinguish or overrule that pair of cases, but the system is working as it was intended to work. It was not an example of judicial activism proper; it was a strain, to be sure, and, indeed, was overruled three to nothing, but still it does not fall into that category of judicial activism proper.

The other side too has misstated the issue, and this is the most important part, because they have constantly couched judicial activism as a matter of the judiciary standing athwart the majority. That is exactly what the judiciary is charged to do, for the most part, sitting as a constitutional court. Its job is to review the other two branches to make sure that they're acting within their authority. Here, indeed, you find the conservatives going back to the progressive era and New Deal conceptions of government, which is striking. They generally are thought to be for limited government, and yet, the view set forth by Robert Bork and set forth by Professor Graglia in his statement before the subcommittee is one that cannot be countenanced if you look at the Constitution seriously. It is a view that has it that the Government has vast powers—the Madisonian dilemma, they say, is that in wide areas majorities have a right to rule simply because they are majorities, whereas in some areas the individual must be protected. That has it exactly backwards. Madison had it just the other way around. Indeed, to reduce it to its simplest, Graglia and Bork are saying, "Whatever isn't prohibited to Congress is permitted." That's exactly wrong.

The rule is "Whatever is not permitted is prohibited." That's what the doctrine of enumerated powers is all about; that's what the 10th amendment is all about.

Accordingly, when we go back to the history of the matter, we find that the New Deal was the crucial watershed. What the Court did in 1937 and 1938 was turn the Constitution on its head. Whereas, it was a document of enumerated powers restrained by both enumerated and unenumerated rights, they turned it into a document of effectively unenumerated powers, which were then subsequently interpreted broadly; the conservatives on the Court interpreted our rights narrowly, liberals on the Court interpreted our rights episodically. My view is that we need to return to a proper interpretation of the Constitution as a document of enumerated powers.

And so, this issue that we're talking about today of judicial activism is really part of a much larger issue, that larger issue being overweening government. When we have the surfeit of legislation that you people have sent out over the past 60 years, since the New Deal court turned the Constitution on its head, it is no surprise that we have the judiciary being called upon to adjudicate often inconsistent, incoherent laws, which invite them—fairly invite them—to make all manner of value judgments, after which they can be seen to be doing nothing but legislate. The problem, in short, begins right here in Congress, and the answer is to start returning to the constitutional principles of limited government, the doctrine of enumerated powers.

And if you set the tone in that, it is my view that you will find the judiciary following in tow. The judiciary does not act in a vacuum; the judiciary acts within a political domain, and if you set the tone of limiting government, restraining your own legislative appetites, then I think that we will find that this issue will correct itself over time.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Pilon follows:]

PREPARED STATEMENT OF ROGER PILON, PH.D., J.D., SENIOR FELLOW AND DIRECTOR, CENTER FOR CONSTITUTIONAL STUDIES, CATO INSTITUTE

Mr. Chairman, distinguished members of the subcommittee, my name is Roger Pilon. I am a senior fellow at the Cato Institute and the director of Cato's Center for Constitutional Studies.

I want to thank Chairman Hyde of the committee and Chairman Coble of the subcommittee for their invitations to me to testify on the important issue of "Judicial Misconduct and Discipline." These hearings have been called, I understand, because of a concern that a number of people have expressed about "judicial activism"—the practice by judges of applying to cases before them not the law but principles or values that are no part of the law. Because such a practice is thought by many to constitute judicial misconduct, some in Congress are searching for ways to discipline it.

I. SUMMARY

At the outset, let me summarize my thoughts on this subject, then discuss it in somewhat more detail. There can be no question that judicial activism, as just described, has been a problem in our legal system for some time. The power of the judiciary under our Constitution to declare the law and decide cases under that law is awesome; when abused, that power is too often beyond reach. At the same time, I believe that many of those who have complained most often about judicial activism have overstated and misstated the problem, thus distracting us from the real issue—legislative activism on the part of Congress, which leads to judicial activism.

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[2] Lino Graglia, "It's Not Constitutionalism,
& Public Policy, 293, 298 (Winter 1996).

[3] Robert H. Bork, *Slouching Towards Gomo*

Overstating the problem. Many of the examples of "judicial activism" that are cited turn out, when examined more closely, not to be cases in which the judge failed to apply the law but applied the law differently, or applied different law, to reach a result different than the result thought correct by the person charging activism. To be sure, there is no bright line between failing to apply the law and wrongly applying the law or applying the wrong law, but when that distinction is drawn, it turns out that there are fewer cases of true judicial activism than at first may appear.

Misstating the problem. More importantly, the problem of "judicial activism" is seriously misstated when it is cast, as it often is, as involving judges overruling the will of the people. In our legal system, judicial review often requires a judge to do just that. In such a case, were the judge to defer to the political will, exercising "judicial restraint" when the law requires active judicial intercession, that restraint would itself be a kind of activism, for it would amount to an "active" failure to apply the law in deference to democratic or majoritarian values. The judge in such circumstances would be shirking his judicial responsibilities every bit as much as if he overrode a legitimate exercise of political will in the name of other values.

Thus, as terms of art, judicial "activism" and "restraint" can be quite confusing and even misleading. What is more, they are often used in ways that camouflage the real issues. What we all want, I assume, is judges who are neither "active" nor "restrained" but "responsible"—responsible to the law. But when the law is unclear or inconsistent, judicial responsibility may be difficult to achieve—and "activism" inevitable. In the end, therefore, our substantive law may be the ultimate source of the problem before us today. That, in fact, is what I will argue shortly. Let me begin, however, with a brief overview of the complaints.[1]

II. THE CRITICS OF JUDICIAL ACTIVISM

Complaints about "judicial activism," however formulated, can be found from our inception as a nation. In their modern form, however, they have come largely since the advent of the Warren Court and most often from political conservatives. My fellow panelist today, Professor Lino Graglia, with whom I have debated the issue more than once, has put the complaint starkly:

> . . . the thing to know to fully understand contemporary constitutional law is that, almost without exception, the effect of rulings of unconstitutionality over the past four decades has been to enact the policy preferences of the cultural elite on the far left of the American political spectrum.[2]

"That is exactly right," comments Judge Robert Bork in his recent best-seller, *Slouching Towards Gomorrah*, "and the question is what, if anything, can be done about it."[3] I gather that these hearings are a partial answer to that question.

The bitter confirmation battle that followed Judge Bork's Supreme Court nomination a decade ago had a way of concentrating the issue for many, of course. Still, the issue has been in the air since the 1950s, covering subjects as various as civil rights, apportionment, federalism, speech, religion, abortion, education, criminal law and procedure, and much else. And in each case, the complaints from conservatives have been essentially the same.

Speaking before the Federalist Society's 10th anniversary lawyers convention last November, for example, Senator Orrin Hatch, chairman of the Senate Judiciary Committee, summarized the issue from his perspective:

> What is at stake . . . is nothing less than our right to democratic self-government as opposed to . . . "Government by Judiciary." For when we commission judicial activists who distort the Constitution to impose their own values, policy preferences, or visions of what is just or right, we are in effect sacrificing our ability to govern ourselves through the democratic

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[1] I have discussed the issues that follow more fully in: "Congress, the Courts, and the Constitution," *Cato Handbook for Congress* (105th Congress), ch. 3 (esp. pp. 36–42), (1997); "A Government of Limited Powers," *Cato Handbook for Congress* (104th Congress), ch. 3 (1995) (reprinted as "Restoring Constitutional Government," *Cato's Letter No. 9* (1995)); "Rethinking Judicial Restraint," *Wall Street Journal*, Feb. 1, 1991, at A10 (op-ed); "Constitutional Visions," *Reason*, Dec. 1990, at 39–41 (review of Robert Bork's *The Tempting of America*); "Legislative Activism, Judicial Activism, and the Decline of Private Sovereignty," in *Economic Liberties and the Judiciary* (J. Dorn & H. Manne eds., 1987); and "On the Foundations of Justice," 17 *Intercollegiate Rev. 3* (1981).

[2] Lino Graglia, "It's Not Constitutionalism, It's Judicial Activism," 19 *Harvard Journal of Law & Public Policy*, 293, 298 (Winter 1996).

[3] Robert H. Bork, *Slouching Towards Gomorrah* 114 (1996).

political processes to the whims and preferences of unelected, life-tenured platonic guardians.[4]

Judges "must interpret the law, not legislate from the bench," Senator Hatch continued. "A judicial activist, on the left or the right, is not, in my view, qualified to sit on the federal bench."[5]

In a similar vein, little more than two months ago Senator John Ashcroft, chairman of the Constitution Subcommittee of the Senate Judiciary Committee, told the Conservative Political Action Conference at its annual meeting that it was time "to take a broader, comprehensive look at the alarming increase in activism on the court."[6] Asking what we can do to put an end to "judicial tyranny," Senator Ashcroft called for rejecting "judges who are willing to place private preferences above the people's will."[7]

Not to be outdone by the Senate, on March 11 House Majority Whip Tom DeLay told editors and reporters at the *Washington Times* that "as part of our conservative efforts against judicial activism, we are going after judges" and are "right now" writing articles of impeachment.[8] Those sentiments were echoed two days later by Congressman Bob Barr of this subcommittee when he appeared on CNN's "Crossfire." Clearly, perhaps as never before, the issue of judicial activism is on the nation's agenda.[9]

III. OVERSTATING THE PROBLEM

It is not entirely clear just what has brought the judiciary and its methods to the nation's attention at this point in time. Cynics point to the need for something—some issue—in a drifting Republican Party: "The revolution is in the doldrums. Nobody's got a plan; nobody's got a direction."[10] Others, however, have noted a rising frustration among conservatives over their relative ineffectiveness on the judicial front despite having dominated the judicial selection process since the Nixon years.[11] And still others cite a series of recent cases that have seemed to crystalize complaints about judicial activism: the district judge who stayed the California Civil Rights Initiative (CCRI);[12] the New York judge who suppressed evidence in a drug case, saying the police had no reason to stop the suspects;[13] the decision by the Supreme Court that the Virginia Military Institute had to become coeducational.[14]

Looked at in broad perspective, there can be no question that the drift in American law over the past 40 years and more has been in large part to the left, as that term is ordinarily understood. And a good part of that drift has resulted from court decisions. Yet by no means can all or even most of the drift be attributed to the courts. Moreover, even that part that has resulted from court decisions does not arise entirely or even primarily from "judicial activism"—not unless that idea is stretched to include every decision that conforms to some leftist political agenda.

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[4] "Remarks of Sen. Orrin Hatch Before the Federalist Society's 10th Anniversary Lawyers Convention," Senate Judiciary Committee News Release, Nov. 15, 1996, at 4.

[5] *Id.*, at 5 (original emphasis).

[6] John Ashcroft, "Courting Disaster: Judicial Despotism in the Age of Russell Clark," March 6, 1997, at 4 (MS available from the office of Senator Ashcroft).

[7] *Id.*, at 3.

[8] Ralph Z. Hallow, "Republicans out to impeach 'activist' jurists," *Washington Times*, March 12, 1997, at 1. See also Katharine Q. Seelye, "House G.O.P. Begins Listing A Few Judges to Impeach," *New York Times*, Mar. 14, 1997, at A24.

[9] This very brief overview barely touches on the vast body of both scholarly and popular literature on the subject, to say nothing of political activism about judicial activism. In this last category, for example, is the Judicial Selection Monitoring Project of the conservative Free Congress Foundation's Center for Law & Democracy, which on January 27, on behalf of 260 grassroots organizations and 35 radio and television talk show hosts, petitioned President Clinton and members of the Senate to nominate and confirm only those candidates for the federal bench who are committed to judicial restraint.

[10] Michael Kelly, "TRB from Washington: Judge Dread," *The New Republic*, Mar. 31, 1997, at 6. See also Laurie Kellman, "Republicans rally 'round judge-impeachment idea," *Washington Times*, Mar. 13, 1997, at A1: "The plan is aimed in part at reviving Republican morale, which has flagged this year because of Mr. Gingrich's ethics troubles and the majority's sparse floor schedule," at A18.

[11] *See, e.g.*, Terry Eastland, "Deactivate the Courts," *The American Spectator*, Mar. 1997, at 60. For a fuller treatment of why conservative efforts to influence the courts have been so unsuccessful, see James F. Simom, *The Center Holds: The Power Struggle Inside the Rehnquist Court* (1995). For a critique of that book, and the Court itself, see Roger Pilon, "A Court Without a Compass," 40 *New York Law School Law Review* 999 (1996).

[12] *Coalition for Economic Equity* v. *Wilson*, 946 F. Supp. 1480 (N.D. Cal. 1996).

[13] *United States* v. *Bayless*, 913 F. Supp. 232 (S.D.N.Y.), rev'd on rehearing, 921 F. Supp. 211 (S.D.N.Y. 1996).

[14] *United States* v. *Virginia*, 116 S. Ct. 2264 (1996).

In fact, when we look at most such decisions closely, we rarely find that the judge or justices "legislated." To be sure, they often reach results consistent, if not with their "whims," at least with their "values, policy preferences, or visions of what is just or right." But those results can usually be tied to some legal anchor, even if it takes some stretch to do so.

Take the recent *CCRI* decision by U.S. District Court Judge Thelton Henderson, which enjoined enforcement of the initiative shortly after it was passed by some 54 percent of California's voters. Many critics of the judiciary immediately pointed to the decision as a blatant example of judicial activism. Judge Henderson's opinion was a stretch, to be sure. But it was not without legal foundation, citing *Hunter v. Erickson*, 393 U.S. 385 (1969) and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982). Moreover, as we know, the case has taken the normal appellate course; the decision has since been reversed by the U.S. Court of Appeals for the Ninth Circuit;[15] and plaintiffs have just filed a petition for certiorari with the Supreme Court. We are likely to learn from the Court whether the cases Judge Henderson relied upon in fact apply or are still good law. In the meantime, however, we are hard pressed to say that his decision was "lawless," however strained it may have been.

One could review putative cases of judicial activism almost *ad infinitum*, of course, but the fact remains that the better part of such cases do not exhibit judicial lawmaking, just better or worse judicial reasoning. It is no small irony, however, that when we do come across a genuine case of blatant judicial activism that cuts the other way, politically, many conservative critics of the judiciary are strangely silent. That was pointed out just last week, for example, by conservative constitutional scholar Bruce Fein in an op-ed in the New York Times, citing the current controversy over the decision of an Alabama state judge to defy a long line of Supreme Court rulings on the separation of church and state "by posting a copy of the Ten Commandments in his courtroom and inviting clergy to lead juries in prayer,"[16] even after a state appellate court found the practices unconstitutional.

IV. MISSTATING THE PROBLEM

In the end, therefore, those who are concerned about judges who seem always to be leaning to the left may be better advised to look less to the judicial role in our system—to the practice of judicial review—and more to the reasoning judges employ in performing their roles and, more importantly, to the sources they employ when doing their reasoning. Bad reasoning is just that and should be called that, not called judicial "activism." But bad law, from which so much bad reasoning proceeds, is another matter. We should hardly be surprised that judges today are thought so often to be engaged in "judicial activism" when they are called upon so often to apply law that is inconsistent, incoherent, and fairly invites them to make all manner of value judgments. In such circumstances, they can hardly be seen to be doing anything but legislate.

We come, then, to what in fact is the crux of the matter. Under our system of law, the role of the judge should be much simpler than it has come to be. The problem, however, does not go back just 40 years, as too many conservatives believe. Rather, its institutional roots are in the New Deal. And its ideological roots are in the Progressive Era, when we stopped thinking of government as a "necessary evil," as the Founders had conceived of it, and started thinking of government as an engine of good, an instrument for solving all manner of social and economic problems. Standing in the way of carrying out that agenda, of course, was a constitution that established a government of limited, enumerated powers—a constitution that held, more or less, until the New Deal. As we all know, however, when President Roosevelt was unable to get his programs past the Court—there being no authority for them under the Constitution—he threatened to pack the Court with six additional members. Not even Congress would go along with that. Nevertheless, the Court got the message; there was the famous switch in time that saved nine; and by 1938 the Court had essentially turned the Constitution on its head, as New Deal architect Rexford Tugwell would later tell us the administration meant for it to do.[17]

In a nutshell, a document of delegated, enumerated, and thus limited powers became in short order a document of effectively unenumerated powers, limited only

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[15] *Coalition for Economic Equity v. Wilson*, 1997 U.S. App. LEXIS 6512 (9th Cir.).

[16] Bruce Fein, "Judge Not," *New York Times*, May 8, 1997, at A39. Cf. Debbie Kaminer, "Thou Shalt Not Display the Ten Commandments in Court," *Legal Times*, May 5, 1997, at 27; Terrence P. Jeffrey, "Governor James at the Courthouse Door," *Human Events*, May 9, 1997, at 6.

[17] "To the extent that these [New Deal policies] developed, they were tortured interpretations of a document [*i.e.*, the Constitution] intended to prevent them." Rexford G. Tugwell, "A Center Report: Rewriting the Constitution," *Center Magazine*, Mar. 1968, at 18, 20.

by rights that would thereafter be interpreted narrowly by conservatives on the Court and episodically by liberals on the Court. Both sides, in short, would come to ignore our roots in limited government, buying instead into the idea of vast majoritarian power—the only disagreement being over what rights might limit that power and in which circumstances. Indeed, we need look no further than to Judge Bork—no liberal he—to see the new vision stated—and wrongly ascribed to James Madison. The "Madisonian dilemma" that constitutional courts face, Bork tells us, is this:

> [America's] first principle is self-government, which means that in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities. [It's second principle is] that there are nonetheless some things majorities must not do to minorities, some areas of life in which the individual must be free of majority rule. [18]

That gets the Madisonian vision exactly backward, of course. America's first political principle may indeed have been self-government, but its first moral principle—and the reason the people instituted government at all—was individual liberty, as the Declaration of Independence makes plain for "a candid world" to see.

Indeed, we did not throw off a king only to enable a majority to do what no king would ever dare. Rather, the Founders instituted a plan whereby in "wide areas" individuals would be entitled to be free simply because they were born so entitled, while in "some" areas majorities would be entitled to rule not because they were inherently so entitled but as a practical compromise.

That gets the order right: individual liberty first; self-government second, as a means toward securing that liberty—with wide berths to state governments, which were later reined in by the Civil War Amendments. That is why the Constitution enumerated the powers of Congress and the executive, to limit them. And that is why the Bill of Rights concludes with the Ninth and Tenth Amendments: to make clear that Americans begin and end with their rights, enumerated and unenumerated alike, while government proceeds only with the power it is given.

The New Deal changed all that, of course, not by amending the Constitution, the proper method, but by radically reinterpreting it: in particular, by reading the General Welfare and Commerce Clauses not as shields against power, as they were meant to be, but as swords of power; then by turning the Bill of Rights into a document of "fundamental" and "nonfundamental" rights. [19] None of that was found plainly in the Constitution—to the contrary, the entire document tends plainly the other way. Rather, it was invented virtually out of whole cloth, by the New Deal Court, to make way for the New Deal's political agenda.

Our modern problem of overweening, inconsistent, incoherent statutory law began, then, not with an activist Court—to the contrary—but with an activist Congress and executive branch, bent on expanding government power. In time, however, the problem was abetted by an activist Court—succumbing to pressure from the political branches. But as noted earlier, the Court's "activism" was not as we think of it today—a search for rights not apparent in the Constitution. Rather, it was activism in finding rationales for power—what conservatives today call deference to the political branches.

It needs to be said again, however, that the New Deal Court's activism was not entirely without legal foundation. The sources for the Court's rulings were there, in the Constitution, even if it did take a high degree of creativity, to be charitable, to draw them out, and even if doing so did fly in the face, for the most part, of a century and a half of constitutional jurisprudence that went the other way.

We come, then, to the bottom line in all of this. Law, including constitutional law, is not written in immutable stone. It is to some extent malleable, of necessity, and is given life by those charged with giving it life—the judiciary. In doing their work, however, judges do not work in a vacuum. They work instead in a larger political climate. If we who shape that climate persist in believing that it is proper for government to be addressing our every problem, no matter how trivial or personal, and persist in believing that our Constitution can legitimately be read to authorize that result, then we should not be surprised that the judiciary is dragged along to play its part in the process—today, often, to try to undue the mess that legislatures make of the effort. [20]

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[18] Robert H. Bork, *The Tempting of America* 139 (1990) (emphasis added).

[19] I have discussed these issues more fully in Roger Pilon,"Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles," 68 *Notre Dame Law Review* 507 (1993).

[20] Thus, the Court has long been criticized by conservatives for its 1971 decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, which gave rise to the "effects test" in antidiscrimination law and to a host of affirmative action programs. But in interpreting the language of section 703(h) of the Civil Rights Act of 1964, which is not "designed, intended, or used to Court), the Court simply drew upon dressed that ambiguity, of course, but ultimately with Congress.

Yes, judges today often thwart their former principal role. Just a ply a facilitator in the grand ente of what has rightly been called century of failed government plan sometimes plays in this setting, i we give judges to work with—the the course of the century.

The Founders had a simpler vi order. They left most human aff ning. That gives the judiciary— what critics of judicial activism w

Mr. COBLE. Thank you, M

Let me hear from Judge con, pro, con. and, Mr. Pil I don't say that critically. read you. [Laughter.]

Mr. PILON. That's a fair

Mr. COBLE. Judge Rader

STATEMENT OF HON. R U.S. COURT OF APPEA BEHALF OF THE FEDER

Judge RADER. Mr. Chai tee——

Mr. COBLE. Take the mic

Judge RADER. Thank you tion to participate in this h

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There is an appropriate cluding criticism by Membe legislative and executive stitution are fully respecte system such criticism is every appeal. The appellat correction is an essential c are not, and should not ev

Yes, judges today often thwart the majoritarian will—as a vestige, perhaps, of their former principal role. Just as often, however, a judge may see himself as simply a facilitator in the grand enterprise of government. We are coming to the close of what has rightly been called the century of government—more accurately, the century of failed government planning. If we are unhappy with the role the judiciary sometimes plays in this setting, it may be that we need to look first to the material we give judges to work with—the reams of statutory material we have enacted over the course of the century.

The Founders had a simpler vision in mind when they set out to craft our legal order. They left most human affairs to private ordering, not to government planning. That gives the judiciary—and Congress—relatively little to do. Is that not what critics of judicial activism want?

Mr. COBLE. Thank you, Mr. Pilon.

Let me hear from Judge Rader next. I wanted to have this pro, con, pro, con. and, Mr. Pilon, I'm not sure where you come down. I don't say that critically. I think you may be on both sides, as I read you. [Laughter.]

Mr. PILON. That's a fair statement.

Mr. COBLE. Judge Rader.

STATEMENT OF HON. RANDALL R. RADER, CIRCUIT JUDGE, U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT, ON BEHALF OF THE FEDERAL JUDGES ASSOCIATION

Judge RADER. Mr. Chairman and members of the subcommittee——

Mr. COBLE. Take the microphone, Judge.

Judge RADER. Thank you for inviting the Federal Judges Association to participate in this hearing.

Just over a year ago, the board of directors of the Federal Judges Association adopted the following statement: "The Federal Judges Association is an independent, voluntary association of Federal judges consisting of most of the Federal trial and appellate judges of the United States. Central to the mission of the Federal Judges Association is, as its charter provides, to preserve and protect the independence of the Federal judiciary from intrusion, intimidation, coercion, or domination from any source."

The Framers of our Constitution knew that a judiciary that operates on a day-to-day basis independent of political control or influence was essential to the national well-being. To ensure judicial independence, the Framers provided in article 3 of the Constitution that Federal judges have life tenure. The Framers did not provide for resignation or impeachment of judges based upon their court rulings.

There is an appropriate place for criticism of judicial decision, including criticism by Members of Congress and the President, whose legislative and executive roles and responsibility under the Constitution are fully respected by Federal judges. Within the judicial system such criticism is commonplace; indeed, it is inherent in every appeal. The appellate system accounts for errors, and their correction is an essential component of the process. Judges' rulings are not, and should not ever be, beyond criticism, but appropriate

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of the Civil Rights Act of 1964, which authorizes "any professionally developed ability test" that is not "designed, intended, or used to discriminate because of race" (at 433, emphasis by the Court), the Court simply drew upon the ambiguity of "used." Congress could later have addressed that ambiguity, of course, but it did not. In cases like this, then, responsibility rests ultimately with Congress.

trary, he produced a Court that went on to new heights of hyper-activism, as in its abortion and racial busing decisions.

Republican presidents supposedly committed to limiting judicial activism made six more consecutive appointments after the Nixon four. Even ten consecutive appointments were not enough, however, to change the direction of the Court. Perhaps Republican presidents have all just been especially inept at making appointments, as in Nixon's appointments of Chief Justice Burger and Justices Blackmun and Powell, Reagan's appointments of Justices O'Connor and Kennedy, President Ford's appointment of Justice Stevens and President Bush's incredible blunder in appointing Justice Souter. Change any one of these appointments for the better and the United States would be a different country. It does not seem likely, therefore, that new appointments will suffice to change the policymaking role the Court has assumed. It is necessary that the role itself somehow be redefined.

The surest remedy for the degeneration of the American system of government into a system of rule by judges is, of course, simply to abolish judicial review. This, however, is unthinkable, even by conservatives who have seen their country stolen from them by judicial review for more than forty years. Even conservatives apparently cannot imagine the country managing somehow to get by without the supervision and ultimate control of Supreme Court Justices. Liberals at least know where their interest lies; conservatives are merely confused.

A much less drastic remedy would be sufficient, however, to bring government by judges virtually to an end. As already noted, the problem is not judicial review as such, but judicial activism which is based almost entirely on the due process and equal protection clauses of the Fourteenth Amendment. The Court has acquired and exercises supreme policymaking power by simply divorcing these two clauses from their historic meaning and treating them as a blanket grant of authority to make itself the final arbiter on any policy issue. An effective and appropriate remedy for the situation, therefore, would be a constitutional amendment restoring the Fourteenth Amendment to what it was intended to be: a federal guarantee of basic civil rights to blacks. Even better would be to extend it to a simple prohibition of all official racial discrimination.

A proposal that constitutional provisions enforceable by judges to preclude popular policy choices should have a definite meaning would not seem to be a controversial one. Realistically, however, the notion that the Fourteenth Amendment will be amended to give it a more definite meaning is little less fanciful than the hope of amending the Constitution to abolish judicial review. It may be useful, however, to point out that there is a remedy for a disease and what it is, even if the patient cannot yet be induced to take it. There should be no doubt, in any event, that our four decade experiment with policymaking by judges has not proven to be an improvement on representative self-government. On the contrary, it has clearly caused the nation great harm. The egalitarian and libertarian policy preferences of the ACLU, so appealing to intellectuals, are inconsistent, unfortunately, with the maintenance of a viable society. No issue facing Americans is more urgent, therefore, than finding an effective means of limiting judicial power.

Mr. COBLE. Thank you, gentlemen, for your testimony and for your presence here.

Professor, I read you as a strict constructionist who opposes activism. Let me put a two-part question to you. On the one hand, should the Congress consider a more active role in impeaching activist judges, or if that is too extreme, should we consider alternative tools such as term limits or periodic reconfirmation to discourage activism?

Mr. GRAGLIA. I think that impeachment is extraordinarily blunt instrument that really can't be made to work in most cases. I agree that if a judge like—I've heard two instances here of Judge Sprizzo who announced that he is simply above the law; his conscience goes first. And I believe that some form of censure should be available for that. However, that's not surprising; that's what constitutional law is today; it is simply Justice Brennan's conscience comes first or Justice Blackmun's. It's one thing to have a system of constitutional law where judges in fact interpret and apply a meaningful Constitution, but what these judges have done is said that "due process" protection and "equal" mean that they are simply author-

ized to do the "right thing," to follow their conscience in every case, and that a lower Federal district court judge should then feel authorized to follow his conscience is not very surprising since that's obviously what the Supreme Court does.

So, we can't have had a long tradition of permitting this and then severely slapping judges down with impeachment. What we need—the only real correction, in my view, is we must make clear that it's one thing to enforce a Constitution with meaningful provisions; it's another thing to give judges the power to enforce a totally empty Constitution, a Constitution to which they can pour any meaning. Since this is all done under the due process clause and the equal protection clause of the 14th amendment, virtually all of it, the remedy is to simply return the 14th amendment to its intended meaning; namely, protection of civil rights for blacks or, even more broadly, simply have it mean it prohibits all racial discrimination by government.

That would effectively and the power of judges to make all our basic social policy decisions. Should we have prayer in the schools? A difficult question, but why should we have a committee of nine lawyers decide that for the Nation, which is where we are now? So impeachment is a very crude tool, I agree. It hardly seems workable. As to term limits judges may work all the faster to do as much damage as they can in the short years they have. I'm not sure that's the answer.

We had Justice Brennan for 36 years. Judges do die, but the robe seems to bestow some element of immortality—a third of a century for Douglas, for Black, for Brennan. That's a long time to have them as our primary policymakers.

Mr. COBLE. Professor, thank you, My time is running.

So speaking of robes, let me shift to Judge Rader. Judge, do you believe that there is no authority which suggests that judges may be impeached for the equivalent of exceeding constitutional authority?

Judge RADER. The constitutional standard is that a judge is subject to impeachment for high crimes or misdemeanors. Another clause in the Constitution, as you've referred to, is that a judge serves for life as long as he continues to abide by his oath, which is good behavior. I believe that there's been no instance in this country where we have departed from that standard and subjected the judicial decisionmaking process to the sanction of impeachment. Indeed, the independence of the judiciary requires something very different. I don't think we wish to have our judges making decisions based on what they perceive the political pressure to be. Rather, we would wish to have them making the decision that they perceive the Constitution and laws to require.

Mr. COBLE. Mr. Pilon, let me put a general question to you. What, in your opinion, constitutes judicial misconduct and how egregious must that conduct be to warrant impeachment?

Mr. PILON. A good example of judicial misconduct is taking place right now in the State of Alabama where the judge, whose name escapes me at the moment——

Mr. FRANK. Moore.

Mr. PILON [continuing].
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ever say to the other. [

Mr. PILON [continuing]. Moore—has posted the Ten Commandments in his courtroom and is urging clergy to lead the jury in prayer, if I'm not mistaken, Christian prayer.

Mr. COBLE. In his courtroom or in his office?

Mr. PILON. Well, I don't know if it would make a difference strictly speaking.

Mr. COBLE. Well, OK. Right.

Mr. PILON. And has been ordered not to do so by a higher appellate State court and is still threatening to do so. That strikes me as getting very close to an impeachable offense because it goes to some very fundamental principles on which this Nation rests, and it defies a whole long line of Supreme Court opinions.

But I would just correct one thing, Mr. Chairman. You suggested that Lino Graglia is a strict constructionist. Lino Graglia is a national treasure. Let's be clear about that. If he didn't exist, as I've often told him, we'd have to invent him.

But he's not a strict constructionist. Indeed, his view, as stated in his prepared testimony, is that judicial activism is the invalidation of "policy choices that are not clearly prohibited by the Constitution." That has the Constitution exactly backwards. That jettisons the doctrine of enumerated powers from the Constitution. That, indeed, is not the Constitution. So you see, this debate about us is a debate between what the meaning of the Constitution is. If we can't, people who are thought normally to be on the right, decide this issue, then I don't know how the 435 of you are going to do it when you get some judge before you on impeachment hearings. I mean, you will really see——

Mr. COBLE. And a healthy debate it is thus far.

Mr. PILON. A healthy debate, yes.

Mr. COBLE. Folks, the bell has been sounded. Why don't we let Mr. Frank use his 5 minutes for questioning and then we'll talk about where we'll go from there.

Mr. FRANK. Let me begin, Mr. Pilon, by saying that if you were to invent Professor Graglia, I think you would have to publish him 18 months after you filed your application, as a result of this committee. We wouldn't want anyone submarining Mr. Graglia on us. [Laughter.]

Let me ask, Professor Graglia, you said it's not a coincidence that the positions of the American Civil Liberties Union have been those of the Supreme Court. Now as you noted in the May-June policy review, there was a period when Republican Presidents, beginning with Richard Nixon, made 10 consecutive Supreme Court appointments. Would you explain exactly how it happened noncoincidentally that 10 Republican Supreme Court appointments in a row came out with the ACLU? Were Nixon, Ford, Bush, and Reagan consciously conspiring with the ACLU, or how did this lack of coincidental convergence come about between those four Republicans and the ACLU positions?

Mr. GRAGLIA. Congressman Frank, as you intended, that's an extremely embarrassing question. [Laughter.]

Mr. FRANK. Thank you. [Laughter.]

Mr. Graglia, that's probably the nicest thing either one of us will ever say to the other. [Laughter.]

Mr. GRAGLIA. No, I'm prepared to say nicer things to you, at least. There may not be reciprocation.

No, it's an extraordinary thing. As Bruce Fein said, one or two appointments by FDR completely turned the Court around. Indeed, Owen Roberts had switched, and it turned around even before the first appointments. And after Black and Douglas were appointed, the Constitution never gave the New Deal the least bit of trouble again, proving it wasn't the Constitution; it was these people.

And one expected that when Nixon, by great good fortune, got four appointments right at the beginning of his term that it would turn the Warren Court around, but it didn't. What the *Brown* decision has done is that it has created an entirely different perception among the country, and certainly among judges, as to their appropriate role. They did this wonderful, great thing. They decided *Brown*. And if they could do that wonderful thing, and 10 years later it became effective and stuck, when Congress acted with the 1964 Civil Rights Act. But the idea was, if they could do a wonderful, moral thing, why don't they do all wonderful, moral things? They became so——

Mr. FRANK. And Reagan and Bush couldn't treat that——

Mr. GRAGLIA. Excuse me?

Mr. FRANK. And Reagan and Bush couldn't find people who could break the——

Mr. GRAGLIA. No, unfortunately, they did not. In Rehnquist, they found an effective man of strength with the view that it really was not his function to make social policy. But the pressures on the judges are all the other way. The only way I can explain this in terms of most of the judges, the Kennedys, perhaps the Stevens, the Blackmun—Blackmun, who turned very much—is that all the pressures on them, the kudos from the law school, the approval from the academy, are a push to the left.

Mr. FRANK. Let me break through it, because you mention Justice Rehnquist, but I'm up to about seven laws that he's voted to invalidate, including, for instance—because you've said that the judges, you think the Supreme Court Justices are unconstrained by the Constitution; they're just doing what they really want. They're giving vent to their preferences.

I have to ask you, when Justice Scalia it was constitutional to burn the flag, that you could not stop someone from burning the flag, do you think he's really in favor of burning the flag and that's why he said it? And let me throw in one other one.

Mr. GRAGLIA. Unconstitutional—he said——

Mr. FRANK. Yes. Are you saying—right. Do you think that that was his preference when he said that it was unconstitutional to ban flag-burning? And let me throw in, so you can answer them all at once, when all the Justices, including Rehnquist and Scalia said that you could not ban indecent messages, another ACLU convergence, do you think Scalia and Kennedy are in favor of indecent messages, and it was their personal preference; they were just pretending to be constrained by the Constitution? So on the flag-burning and on indecent messages, do you maintain that Scalia and Kennedy and Rehnquist were doing what they really wanted to do rather than what they interpreted the Constitution as requiring?

Mr. GRAGLIA. Yes, in no re
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e Constitution as requiring?

Mr. GRAGLIA. Yes, in no realistic sense are they interpreting the Constitution. First of all, as was pointed out today, what in the Constitution are you referring to? Oh, the first amendment.

Mr. FRANK. No, excuse me. Specifically, are you telling me that you believe that Scalia, Kennedy, and Rehnquist are in favor of flag-burning and in favor of indecent messages, and that's why they decided that way?

Mr. GRAGLIA. No, but they are in favor of retaining the judicial power to pass on laws like——

Mr. FRANK. But, Professor, Graglia, excuse me, because I want to focus on this. You said, however—I understand that, but you could be in favor of maintaining the power and still not find it operative on a particular case. Your clear statement was that when they made these decisions, they were not even trying to interpret the Constitution; they were simply giving vent to their own consciences.

Mr. GRAGLIA. Yes, there is nothing there——

Mr. FRANK. And do you believe that that describes those Justices in these cases?

Mr. GRAGLIA. Congressman Frank, what do you think they were interpreting in the flag-burning cases? They were interpreting the due process clause of the 14th amendment. There's nothing else. No, wait a minute; they're interpreting the first amendment, right?

Mr. FRANK. Yes.

Mr. GRAGLIA. No, the first amendment says "Congress shall make no law"; it doesn't say Texas shall make no law.

Mr. FRANK. I understand, though, Professor Graglia, you're missing my point.

Mr. GRAGLIA. I'm sorry.

Mr. FRANK. I disagree with you on the substance, but you may think they were wrong, but you made a statement that you didn't even think they were trying to be right, that they were simply giving vent to their own personal preferences.

Mr. GRAGLIA. They——

Mr. FRANK. I think that's an inaccurate description of what Kennedy, Rehnquist, and Scalia were doing in those cases.

Mr. GRAGLIA. It is an accurate description, but we have to state their preference a little more broadly than you did, I'm afraid.

Mr. COBLE. Professor, let me get my oars in the water. You guys continue this. We have a vote on, and there will be two votes, I'm told. Why don't those of us who want to vote go to the floor to vote. You all stand easy here. Barney, you and the professor may continue this. [Laughter.]

And then we will return to continue the questioning.

Mr. FRANK. Well, I think I'll go vote with you, Mr. Chairman. We can continue this—my colleagues, I think, may want to continue as we go back.

Mr. COBLE. We'll be back imminently.

Mr. FRANK. I will go to the floor and defend Justices.

[Recess.]

Mr. COBLE. When we left, the gentleman from Massachusetts and the professor from Texas were engaged in dialog, but Barney's not here. We'll pick that up when he comes back, Professor.

The gentleman from California, Mr. Bono.

Mr. BONO. Thank you.

I want to thank you all for testifying, and it's impressive to have such great minds all here at one table and listen.

I, for whatever reason, I got on Judiciary. I haven't figured that out yet, but here I am. [Laughter.]

And so I look at things differently, I think, than my colleagues, especially listening to them debate and listening to the issues.

Judge RADER. Congressman, I did, too, and I'm still trying to figure it out. [Laughter.]

Mr. BONO. Oh, well, you, too.

The other day I asked a question about conspiracy, and it was a short question; it took me about 8 seconds, and the debate lasted for two hours, and I never got the answer to my question. It was amazing.

But my point is this: coming from the street, if you will, and coming from nothing to do with government and bureaucracy, when we hear these kind of issues, the Constitution always comes up. Civil rights always comes up. There's always discussions about great cases and great decisions. Yesterday our attorney general brought a tape in. It was a tape of one of his lawyers and a judge. He just wanted to show sometimes the difficulty which he claims happens quite often. This judge was, in my view, at that particular time insane. He wouldn't allow the lawyer to ask a question, and it went on for several minutes, 10 or 15 minutes. Every word that came out of the lawyer's mouth, there was a threat of going to jail or being yelled at and humiliated. And so, again, not being a lawyer, he denied that lawyer her constitutional rights in my view. I mean, it seemed like she had as much right to ask questions and get answers as he did to make all the demands.

What I keep going back to is this tremendous imbalance, especially the judicial area, and I guess some of you were here when I said I was a mayor, and people could say whatever they want, but in a court it is concise that you must adhere to the rules of that judge. However, it seems like you don't have equal rights or near equal rights. When you discuss equal rights, is the abuse of civil rights in a courtroom, OK? I don't know who to ask.

Mr. GRAGLIA. That's obviously not OK, Congressman, and, presumably, there are—I don't know if this is a Federal judge or a State judge.

Mr. BONO. It's a Federal judge.

Mr. GRAGLIA. Well, there certainly are procedures for judicial misbehavior, and that seems like recorded, clear misbehavior by any standard. Now it is the case, as Judge Rader said, in the wise words of Senator Thurmond, that it's important that judges be humble; that's crucial. He's perfectly right about that, because hubris is the occupational disease of judges. They sit there in their robes looking like priests, the only officials we have in American government to have an official uniform. They sit typically in temples, and people have to stand when they enter a room and address them as "Your Honor." And to maintain humility with much of that experience is quite difficult, which is perhaps the best argument for term limits for judges, that no human being can be that honored and obeyed so long without it distorting his mind. And you have judges that, indeed, think they are petty tyrants, and we must have rules within the judiciary f
out a doubt.

Mr. BONO. You bring up a g
and I'll let you speak. I just w
that being in show business and
and if it happens where you rea
you could reach, it is mindbog
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If I can have——

Mr. COBLE. Mr. Pilon, you ha
swer that very briefly.

Mr. PILON. Yes, Congressman
dinarily important issue here.
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Mr. BONO. Well, good.

Mr. PILON [continuing]. And

Mr. BONO. They sure can.

Mr. PILON. In any event, the
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those should be addressed dir
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judge—this is precisely the k
to complain about, that we m
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century. It must go.

Mr. BONO. Thank you.

Mr. COBLE. Mr. Pilon, I tha

Judge, I'll get to you later.
Michigan now, and then I'll
journ. The gentleman from M

Mr. CONYERS. Thank you,

have rules within the judiciary for sanctioning such behavior, without a doubt.

Mr. BONO. You bring up a good point. You did want to speak, and I'll let you speak. I just want to go back to one other issue: that being in show business and being successful in show business, and if it happens where you reach heights that you never believed you could reach, it is mindboggling, and you do lose yourself. I mean, you get carried away, and you do have this power. My fear is that power there is so one-sided and maybe too much. Now I don't say "impeach, impeach, impeach." But accountability and equal rights; I think that's very important in the judiciary as well as any other branch of government.

If I can have——

Mr. COBLE. Mr. Pilon, you had your hand up. Go ahead and answer that very briefly.

Mr. PILON. Yes, Congressman Bono, I think you raise an extraordinarily important issue here. Let me say, first of all, that you're not sure how you got on Judiciary; I, too, started as a rock-and-roll player——

Mr. BONO. Well, good.

Mr. PILON [continuing]. And so lives can take unusual twists.

Mr. BONO. They sure can.

Mr. PILON. In any event, the case that you raise sounds like an egregious case. It is not the kind of case, though, that it strikes me is one that is subject to the kind of periodic judicial oversight; rather, it is subject to the kind of legislation that you were discussing yesterday before this committee, especially this idea of moving a disciplinary complaint out of the circuit or court in which it is raised, because the kind of collegiality that you find and that is necessary among members of a court is anathema for adjudicating these disciplinary matters. You simply cannot expect the court or anybody, for that matter, to police itself, starting with the Justice Department or the administration, let us say. You simply cannot—if that is true with respect to those bodies, a fortiori it is true with respect to the court, the members of which often work very closely with each other and are in no position to discipline one among them. And so I would strongly urge you to look at the kind of legislation you had before you yesterday because it addresses precisely the kind of problems you're raising here.

And, finally, insofar as there are any restrictions upon bringing public obloquy upon people of the kind that you have pointed to, those should be addressed directly, because contempt citations, and so on and so forth, against people who would complain about a judge—this is precisely the kind of behavior that we must be able to complain about, that we must have free speech about, and this idea of disrespecting the judge is something that is from another century. It must go.

Mr. BONO. Thank you.

Mr. COBLE. Mr. Pilon, I thank you. I thank the gentleman.

Judge, I'll get to you later. Let me recognize the gentleman from Michigan now, and then I'll get back to you, Judge, before we adjourn. The gentleman from Michigan.

Mr. CONYERS. Thank you, Chairman Coble.

We came here today to have a discussion of judicial misconduct and discipline, and this is the last panel. I haven't discussed with the chairman whether there will be further hearings or a need for them. Most of you have heard the previous testimony from Members and other witnesses. So what is the lesson? Where are we now on this subject? How could this be summed up? We've had quite a range of views, but, from my point of view, we haven't come across much judicial misconduct at this hearing. We've discussed several judges that may be in need of discipline, and no one has indicated that the machinery for that kind of action is defective. So where does this leave your humble Judiciary Committee at this point? What do we do now besides have a late lunch?

Professor.

Mr. GRAGLIA. If I were to try to provide examples of judicial misconduct, when Rosemary Bird, Chief Justice of California, she was adamantly opposed—Bird, to capital punishment, and she reversed all capital convictions. She found some grounds—I think it's fair to say she created or made up some grounds to reverse every capital punishment case she saw. That was also what was said of the judge that Ms. Stout, I believe, was talking about. Well, that's judicial misbehavior.

I could give you any number of Supreme Court decisions. For example, you have a Federal statute passed by Congress that said children will be assigned to school without regard to race; children are not to be assigned for a racial balance. And there's a Supreme Court case, *Swann* v. *Charlotte-Mecklenberg*, that says it's appropriate to assign children to school on the basis of race, that Congress didn't mean that statute to apply to the South. You have Justice Brennan saying in the notorious *Weber* case that, yes, the statute says you can't discriminate against whites in employment, that literally understood, *Weber* has a strong case, but the spirit of the statute was different. The spirit was exactly the opposite of the statute. Well, these are actions that are not taken in good faith.

I don't think impeachment, by the way, is the answer there. What to do?

Mr. CONYERS. Professor—yes, that was the question.

Mr. GRAGLIA. All right, what to do? You know, I said I went to the heart of this. I happen to think——

Mr. CONYERS. You've consumed a couple of minutes of my time getting to the question. Now we're going to answer my question.

Mr. GRAGLIA. OK. Unfortunately, I take the position that the problem is much more serious than most people think——

Mr. CONYERS. Yes, but what are we to do?

Mr. GRAGLIA. What you ought to do is you ought to start proceedings to have a constitutional amendment that provides that the 14th amendment means something. The heart and soul of our problem is that the Supreme Court now treats the 14th amendment as meaning nothing or anything that they choose it to mean.

Mr. CONYERS. Would you be willing to help our staff draft such an amendment?

Mr. GRAGLIA. Yes, I would.

Mr. CONYERS. Well, I want to accept your invitation, and I've got some staff and I think the chairman does, too, and that would be something tangible that comes out of these hearings, wouldn't it?

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Now on another point—and I just thought I heard you right—the May 17, 1954, decision of *Brown and Education* was not one that you thought—what did that illustrate to you?

Mr. GRAGLIA. Well, it illustrated that the Court felt that it was endowed with remarkable power and that it was in a position to work a giant social revolution, changing the position of a third of the country, but it really realized how weak it was, and so it went and hid for 10 years. It made no attempt to enforce the decision. In fact, it maybe extended segregation. The Congress might have acted sooner. It hid for 10 years, but segregation was effectively ended when Congress acted in the 1964 act.

Mr. CONYERS. Was that an example of activism?

Mr. GRAGLIA. Yes, it was. It was an example of perhaps as close to justified activism as one can have. I define activism as holding something unconstitutional that the Constitution does not clearly prohibit. And in *Brown* they held something unconstitutional——

Mr. CONYERS. OK, finally, because the light's on, you've taught constitutional law for how—many years?

Mr. GRAGLIA. Thirty years, yes.

Mr. CONYERS. So that means thousands of young lawyers have come through your constitutional courses?

Mr. GRAGLIA. Yes.

Mr. CONYERS. Maybe 10,000?

Mr. GRAGLIA. That might be high. I teach about 100 a year.

Mr. CONYERS. OK. So——

Mr. GRAGLIA. A 100 times 30 is 3,000, yes; that's quite a lot.

Mr. CONYERS. And they're now out here practicing law somewhere in the several States?

Mr. GRAGLIA. Yes. Those Texans tend to stick to Texas, unfortunately, but——

Mr. CONYERS. And your views, of course, that are reflected here are taught in the course of your teaching at the law school?

Mr. GRAGLIA. That's correct.

Mr. CONYERS. All right, thank you very much.

Mr. COBLE. Thank you.

The gentleman from Florida.

Mr. CANADY. Thank you, Mr. Chairman. I apologize for being late to return from our votes.

Mr. Henderson, let me ask you this: what acts of a judge, other than the commission of a crime, do you believe would justify the Congress considering impeachment?

Mr. HENDERSON. Well, Mr. Canady, I think the basis of impeachment is listed explicitly as high crimes and misdemeanors. So actions that fall within the definition of those terms I think would be a basis——

Mr. CANADY. I was trying to have a short way of asking you what you thought that meant.

Mr. HENDERSON. Well, I think——

Mr. CANADY. That's the question.

Mr. HENDERSON. I think in one sense it means what it says. It means that crimes that are, in fact, felonies or crimes which constitute misdemeanors within the spirit of a serious offense would be a basis for impeachment. The idea of——

Mr. CANADY. Well, now, let me ask you this: so you think it has to be an indictable offense, and no conduct other than an indictable offense would justify the Congress considering impeachment? What about—I don't know if you've heard of this case relating to Judge Nixon, and we're not here to try Judge Nixon——

Mr. HENDERSON. Certainly.

Mr. CANADY [continuing]. But if a judge simply doesn't carry out the responsibilities of his office by dealing with the matters that come before him in a timely way, if a judge refuses to act on cases for years because of an obvious bias, wouldn't that at least raise a question about whether some action should be taken to stop that?

Mr. HENDERSON. Well, I would say this, Mr. Canady: if a judge were found to have ignored his or her responsibility——

Mr. COBLE. Mr. Henderson, pardon me. Mr. Canady, please repeat. I was talking to Blaine, and I didn't hear your question.

Mr. CANADY. Well, what I'm trying to get at is, are there any circumstances in which a judge's performance in office could justify impeachment when the judge has not committed an indictable offense?

Mr. HENDERSON. Well, let's assume, for example, that a judge chose not to come to work, chose not to take assignments, chose not to carry out the responsibilities of a judge—in this instance, a Federal judge. That individual would not have been indicted for the commission of a crime.

Mr. CANADY. But you think that would be impeachable?

Mr. HENDERSON. Well, no, I didn't. What I said, though is—I'm using that as an example of an act by an individual judge that might warrant additional scrutiny and review by his or her peers. I take the position, sir, that——

Mr. CANADY. Now wait. That's not my question at all.

Mr. HENDERSON. If your question is whether that——

Mr. CANADY. Mr. Henderson——

Mr. HENDERSON. Sir.

Mr. CANADY [continuing]. You know, I appreciate your testimony; I think it's been very valuable, but this is a pretty simple question.

Mr. HENDERSON. It is.

Mr. CANADY. Now if you don't think that a judge should ever be impeached for anything other than committing a crime, that's a legitimate viewpoint. I don't think I would agree with it, but I'm trying to find out if that's what you think. If not, then——

Mr. HENDERSON. Well, I was giving you an answer, sir.

Mr. CANADY [continuing]. I want to get the understanding of what the parameters are for when impeachment is something proper to consider.

Mr. HENDERSON. I think that's fair. And as I told you——

Mr. CANADY. And I'm not talking about peer review.

Mr. HENDERSON. OK.

Mr. CANADY. I'm talking about impeachment.

Mr. HENDERSON. As I said to you, sir, if, in fact, an individual judge commits a crime or misdemeanor, an indictable defense, that's obviously a clear basis for impeachment. Now if an individual——

Mr. CANADY. Well, we have all agreed on that.

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Mr. HENDERSON. If an individual engages in a dereliction of duty and responsibility, that triggers the kind of peer review that we've talked about. In the event that peer review under those circumstances may be insufficient to address the problem, then you may, in fact, need to pursue additional activity, if you have exhausted the peer review process that is in place. If a judge refuses to come to work and the peer review process that is used finds it impossible to encourage that judge, for whatever reason, to accept those responsibilities, then it may require something more serious. But that is certainly the most limited and extreme circumstance one could find.

Mr. CANADY. OK, you can't——

Mr. HENDERSON. I think in most instances—in most instances—the basis of impeachment means what it says: high crimes and misdemeanors.

Mr. CANADY. But you would recognize a limited class of other cases? Let me say, I agree with you. I think that impeachment should be very much a last resort, and if there's any other way to solve the problem, that should be attempted at length before consideration of impeachment is entertained. And I am not one of those who has suggested that we impeach any judges, although I probably have the distinction of being maybe the only Member here, one of the few Members of the Congress who's actually filed a resolution of impeachment against a Federal judge, who happened to be sitting in a Federal penitentiary convicted by bribery, drawing his salary as a Federal judge. Now the Judicial Conference was taking its good time in dealing with it. I thought we had a constitutional responsibility here in the Congress to cut off his salary and remove him from office. There was no question about his guilt of the offense of bribery. But I think that, again, that's a case that's very clear.

Let me shift a little here. There's a debate about what the circumstances are when Congress is justified in proceeding with impeachment proceedings. Let me ask you, Mr. Henderson, do you think the decision in the House—with the Chair's indulgence, I'd just like to finish this question. If the House proceeds with impeachment proceedings or the Senate—and then the Senate acts on that and convicts, are the decisions of the House and the Senate in connection with impeachment matters that are reviewable by the Federal courts?

Mr. HENDERSON. I believe, sir, that—are you asking me the question——

Mr. CANADY. Yes.

Mr. HENDERSON [continuing]. Of whether action taken by the House in pursuit of an impeachment against anyone in particular—or are you just saying if they exercise——

Mr. CANADY. Yes, if the House impeaches somebody, is that something that's subject to review in the Federal courts? We've been talking a lot about judicial review. I just wonder, in your view, how that should apply in the context of impeachment.

Mr. HENDERSON. Certainly one can petition the court to review whether the procedure used by Congress is consistent with the requirements of the Constitution. Now in most instances—in most instances—I would think that concern about separation of powers

would limit the scope of judicial review of a particular action to the most egregious of circumstances. But if the question is, would you be summarily thrown out of court merely because you sought to have an action taken by Congress reviewed, the answer is, no, you are not per se barred from seeking relief in court.

Mr. CANADY. With the chairman's further indulgence, I'd just like to ask if there are other members of the panel who would like to comment on that particular question.

Mr. PILON. If a petition went to the court, I think the court would treat it as a political question.

Mr. CANADY. Professor Graglia.

Mr. GRAGLIA. I think that's probably the case. The court has refused to pass on questions of whether constitutional amendments were properly adopted, calling it a matter coming under the so-called political question doctrine. And I could not imagine that if Congress said that this judge has committed impeachable offenses, as they defined it, and then removed him, that the court would reverse that. I wouldn't think so.

Mr. CANADY. OK. Judge, do you have a comment on that?

Judge RADER. No comments on that specific issue, which could come before——

Mr. CANADY. OK. Obviously. [Laughter.]

Well, again, I want to express my gratitude to all the members of this panel. Your testimony has been very helpful.

Mr. COBLE. I thank the gentleman from Florida.

The lady from California.

Ms. LOFGREN. Thank you, Mr. Chairman.

As I've listened here this morning, I've found it an interesting panel. We have the Cato Institute, which is, I think, acknowledged by all as an extremely conservative group. I think you used that same word really——

Mr. PILON. No, no. We eschew the term "conservative"——

Ms. LOFGREN. Oh, do you? I didn't mean to insult, but—[Laughter.]

Mr. PILON. We call ourselves classical liberal or libertarian.

Ms. LOFGREN. All right, I want to use the precise terms.

Mr. PILON. Jeffersonian would be another way of putting it.

Ms. LOFGREN. In reading your testimony, which I found really to be excellent and well-reasoned——

Mr. PILON. It contains nothing but true sentences. [Laughter.]

Ms. LOFGREN. And written by a very modest person. [Laughter.]

Although I don't share your overall philosophy, I thought that your analysis of the role of the judiciary and its importance in protecting the rights of the minority to be right in keeping with all of, I think, the thought that I have seen throughout my life on the role of an independent judiciary.

And listening to the professor's comments, I must say, thank God for the first amendment; we can all say what we think is correct and true, but I found your views to be unusual at least, not what one commonly hears from law professors. We do have a letter signed by, I think, 110 law school deans, including your own dean at the University of Texas, strongly taking a contrary view. So it was good to have you here with——

Mr. GRAGLIA. How is it cc
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Mr. GRAGLIA. How is it contrary? Undoubtedly, they're against widespread use of impeachment.

Ms. LOFGREN. I don't have the letter right in front of me. Mr. Delahunt asked to have it placed in the record, and we'll get you a copy of it. I'd provide it to you now, if I had it.

As I've listened to your testimony, Professor, I'm struggling to understand fully your point of view because, in all honesty, it doesn't make sense for me quite yet. Thinking about what the Court has done recently, striking down measures that the Congress, the legislative branch, adopted—for example, the recent Court decision that held that Congress lacked the ability to regulate certain gun activities near schools; would you include that decision as judicial activism of a sort that should be condemned?

Mr. GRAGLIA. As a matter of fact, yes. I wrote a long article in the Texas Law Review severely criticizing the *Lopez* case.

Ms. LOFGREN. Recently, the Court has also been moving in a different direction in terms of the takings clause, which I would argue has corrected some overstepping that occurred in the past. Regarding the recent decisions that have declared as unconstitutional takings some of the zoning regulations that are so popular in the West in suburban communities, what's your view of those?

Mr. GRAGLIA. Well, my view is that they are definitely judicial activism. Remember, judicial activism as I define it is holding things unconstitutional that are not clearly unconstitutional. You say you have some difficulty with my position. I think it could hardly be more simple. Courts should not hold anything unconstitutional that isn't; that's all, unless the Constitution clearly disallows it. You know, this is an extraordinary power that this committee of nine lawyers holding lifetime appointment, unelected, that they should sit there and pass upon the works of the elected representatives is entirely inconsistent, as I say, with separation of powers, federalism, representative self-government. The only way you can possibly justify it is, if the judges can say, look, we're not doing it; the Constitution happens to say you can't do that.

Ms. LOFGREN. Let me ask a followup question.

Mr. GRAGLIA. But that's very easy. Excuse me. If I may say, you're right about the taking cases; that is activism. I think that very little will come of those cases. However, it remains the case that the overwhelming bulk of Supreme Court opinions continue to be the ACLU position. The important decisions on things like VMI—you can't have an all-male military school—now where do you suppose that is in the Constitution? They made that up.

Ms. LOFGREN. Professor, if I may——

Mr. GRAGLIA. Or term limits——

Ms. LOFGREN. I also have to live by the 5-minute rule, so I'd like to ask another question, if I could, because there are other panelists that I think would like to speak.

Thurgood Marshall for many, many years refused to support capital punishment—he always dissented on death penalty cases. Would you consider that activism and the kind of activity that should have subjected Thurgood Marshall to an impeachment inquiry?

Mr. GRAGLIA. Now, there's no question that it's activism, the first part of your question. Indeed, the Constitution explicitly recog-

nizes, contemplates capital punishment in at least in three places, quite clearly.

Ms. LOFGREN. So your answer would be——

Mr. GRAGLIA. So, clearly, it's activism. So for a judge to say that capital punishment is unconstitutional in a Constitution that recognizes it is in defiance of the Constitution. Now I would not suggest impeachment, however, because we have permitted judges to do this for at least the last 40 years, and, indeed, in fact, much longer. Impeachment is much too blunt, crude, and, in my view, an inappropriate way to deal with that kind of problem.

Ms. LOFGREN. Let me hear from Mr. Pilon, if I could, who's desperately wanted to speak earlier——

Mr. PILON. Just one——

Ms. LOFGREN [continuing]. If we could let him address these issues, then I'll stop.

Mr. PILON. Yes, you've done a marvelous job, Congresswoman Lofgren, of flushing out Lino, although, with all due respect, it's not terribly hard. The beauty of Lino is that he's clear, crisp, and dead wrong. His idea that *Lopez* was wrongly decided, that the takings case is wrongly decided, and that these are cases of judicial activism, bring us back to the fundamental point: his argument is with *Marbury* v. *Madison*. His argument is with judicial review as an institution. He is—and I've told him this often—uncomfortable with the constitutional Republic that we live under. He is a parliamentarian at heart. He would be much happier if we were ruled by changing majorities under periodic elections, majorities that essentially had plenary power, and when we don't like what they're doing, we just vote them out. It goes back to Wilmore Kendall at Yale, who is the source of a lot of this thinking, and it really is a quite simple view. He's right; it's very simple, but it's not our system.

Ms. LOFGREN. With the chairman's indulgence, I now have the letter, and I'll make a copy for you, Professor, but specifically the quote, I think, that completely contradicts your point of view is, "Thus, our Founding Fathers created an independent Federal judiciary to interpret the Constitution, protect the civil liberties and fundamental rights of each and every citizen against the tyranny of the majority." And it goes on into some detail in defense of our current system, signed by 110 law school deans, including your own——

Mr. GRAGLIA. I have no difficulty with that, obviously, as long as they're interpreting the Constitution. If the Constitution says, for example, you can't deny the vote to women, which it does, and if any State then said, "We're going to deny the vote to women," I'd have to say that's unconstitutional. So I'm fully in——

Mr. FRANK. Would the gentlewoman yield to me for one question?

Ms. LOFGREN. Certainly.

Mr. FRANK. Professor Graglia, because I'm fascinated by this, you've obviously done a lot of reading. You're very scholarly about this. Has Congress, in your judgment, ever passed an unconstitutional statute or have you ever seen one that was unconstitutional?

Mr. GRAGLIA. It would be easier for me to answer a State. I think States have passed unconstitutional statutes, yes.

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atutes, yes.

Mr. FRANK. It would probably be easier if I asked you if two and two were four, but that's not what I asked you.

Mr. GRAGLIA. Right, right.

Mr. FRANK. Particularly since you have the 14th amendment problem with what it covers, has Congress, in your judgment, ever passed an unconstitutional statute? That gives us a sense of what the scope of your reading of the Constitution is.

Mr. GRAGLIA. You could certainly make a very good argument that the Alien and Sedition Acts were unconstitutional. On the other hand, since they were passed so close to the time of the Constitution and the Bill of Rights, it also could be said to indicate that the first amendment was thought to mean an awful lot less than we think.

Mr. FRANK. Anything in this century you can think of that was unconstitutional? Only the Alien and Sedition Acts?

Mr. GRAGLIA. Nothing readily comes to mind, no.

Mr. FRANK. OK, I appreciate that because I think that does have an illustrative part. Thank you.

Mr. GRAGLIA. Do you have one in mind, Congressman, if I may ask you?

Mr. FRANK. Pardon?

Mr. GRAGLIA. Do you know of an unconstitutional statute Congress has passed?

Mr. FRANK. Oh, I thought the Communications Decency Act, for instance, where—I agreed with Justice Scalia and Justice Kennedy and Rehnquist that banning indecent speech would be a mistake. If we banned indecent speech, I suppose I should—I'll act against interest here. If we banned speech I considered indecent, we'd be through by Wednesday morning every week. [Laughter.]

Mr. GRAGLIA. No, I agree with you it would be a mistake. I agree with you it would be a mistake, which is what you said——

Mr. FRANK. I think it was unconstitutional. I do think no law——

Mr. GRAGLIA. But whether it was unconstitutional is another question.

Mr. FRANK. Well, but it was Congress; we don't have a 14th amendment there, and the 1st amendment does say no law restricting speech. I think indecent speech is speech. It wasn't banning indecent gestures; it was banning indecent speech. And if no law doesn't mean that, then I don't know what it means.

Mr. GRAGLIA. Congressman, you know it doesn't ban perjury prosecutions; it doesn't ban Federal statutes to make it a crime to——

Mr. FRANK. You think it does not—that it's OK to ban indecent speech or offensive speech?

Mr. GRAGLIA. Well, you said—Congressman, you're much too sophisticated to say it says no and that gives us our answer.

Mr. FRANK. Right, but it doesn't mean anything——

Mr. GRAGLIA. I'm afraid the chairman will cut us off before we fully settle this.

Mr. FRANK. No, Mr. Graglia, I think he'll give us another minute to say this, Professor Graglia: I'm not saying it's automatic, but you're saying it's automatically not. I'm saying that at least it gets—your view was, unless it's very clear—you have interpreted—

I've asked you if Congress has ever passed an unconstitutional statute. You said not since the Alien and Sedition Acts——

Mr. GRAGLIA. No, Congress can read the Constitution. You people are literate.

Mr. FRANK. No, you're just changing the subject, Professor Graglia. We're talking now about what "no" means, and it does seem to me that you have interpreted that absolutely out of existence, and I do think, when it says you should make no law restricting the freedom of speech, and you say people can't talk indecently, you have violated that, and when you tell me that we haven't violated it, that because we can ban perjury, we can also ban indecent speech, I think the clarity——

Mr. GRAGLIA. But that doesn't mean that it doesn't mean anything. There are some things Congress can't do. For example, if Congress passed a law saying no book shall be published prior to having congressional imprimatur, that's unconstitutional. Now Congress doesn't pass that law.

Mr. FRANK. Right.

Mr. GRAGLIA. Or if Congress passed a law, to use the example——

Mr. FRANK. Right, but Congress has never, in your judgment, since the Alien and Sedition Act passed a law that was unconstitutional. I guess I shouldn't quarrel with you because we have never gotten higher grades from anybody, and I will accept the compliment. [Laughter.]

Mr. COBLE. Is the lady from California finished?

Ms. LOFGREN. Yes.

Mr. COBLE. To shift from the spirited exchange between the gentleman from Massachusetts and the professor from Texas, Mr. Pilon, I conclude by your generous comments to the gentlelady from California that you are now holding her harmless for having labeled you a conservative. So you all have made up?

Mr. PILON. Yes. In fact, she is immune——

Mr. COBLE. Very well.

Mr. PILON [continuing]. As the Constitution says, for anything she says in these proceedings.

Mr. COBLE. Well, our final member, who is our honorary visitor today, the gentleman from Tennessee, Mr. Bryant.

Mr. BRYANT. Thank you. I, again, thank the chairman for allowing me the courtesy of speaking to this very distinguished panel. I certainly respect the credentials and the background that you all bring into this hearing. I suspect I disagree with some of the things some of you have said, but, again, I do respect it greatly.

My curiosity is on that evil "I" word, "impeachment." But I do see it in the Constitution, and I do see it as a power that Congress has and one that we have to review and look at as the occasion arises. We are subject to representing people that elect us, and when we have people circulating petitions with 27,000 signatures on it about a judge and calling for his impeachment, we have to pay attention. We don't have life tenure. We're not teaching in a law school with tenure or working for an organization. That's our job to pay attention.

So when I see this and I hear, and certainly know, that there are instances in the past—I respect the separation of powers and the independence of the judiciar
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independence of the judiciary. I understand that. I know we share that view. But when I see the Court going on to our side of the fence, and legislating tax increases and things like that, and I don't really see an uproar about that particularly, and I see it upheld by our Supreme Court—or especially I see a judge, like the one in Nashville in the middle district who apparently is substituting his own personal views or biases against the death penalty in place of the law—it causes me concern. I would love for him to come out and admit he's doing that, but I haven't found too many judges to do that.

You have to look at the record. That's the only way you can. Judges don't go out and give speeches at the Rotary and say they're against the death penalty.

So I'm curious as to what each one of you thinks about, Mr. Henderson, you've talked about high crimes and misdemeanors, the other provision that's tied specifically to life tenure for judges. The President doesn't have it. The President now has term limits. Certainly the other branch of government has term limits in the sense that we face the electorate every 2 years or 6 years. But, clearly, the Federal judges have a life tenure.

And the attachment, based on good behavior, seems to carry more, I think, importance to it than what one of our prior witnesses attached to it. And if you accept the fact that high crimes and misdemeanors, which I don't accept, but accept the fact that it means a crime, what does good behavior mean then?

Mr. GRAGLIA. I think you would have a very difficult time, it would be inappropriate, to try to impeach a judge because of what he claims to be his interpretation of the law, because we have allowed judges to make up the law entirely out of whole cloth. Judge Russell Clark has now issued orders that are approaching, if not exceeding, $2 billion in Kansas City—absolutely depriving the rest of the school systems of Missouri of funds. The roofs leak; the driveways are unrepaired—$2 billion and the orders keep coming out, and they're obeyed. And I sit here and wonder, When does Congress say no? If $2 billion is not enough, what is it, $10 billion? A hundred billion? Is there some point where you say no? Could you impeach Judge Clark for doing this? Of course not. He's doing it subject to control of the eighth circuit. If those opinions, if those orders are enforced, the eighth circuit has approved them, and the Supreme Court has either approved them or, more likely, has refused to review them.

Can you say to Judge Clark, "You're making this up, Judge Clark. You have no authority to do this."? We'd be perfectly right, but everything the Supreme Court does is made up and they have no authority to do, either.

Mr. BRYANT. Well, let me ask you, should we then, if we disagree with Judge Clark, pass a constitutional amendment to change that?

Mr. GRAGLIA. I think the problem——

Mr. BRYANT. Or why can't we impeach him?

Mr. GRAGLIA [continuing]. Is very serious and very basic. We simply have to say that constitutionalism, judicial decisionmaking according to a Constitution that has knowable meaning, is one thing and acceptable. It's not parliamentarianism, but it is defen-

sible. What our judges have done forever, is made of the due process and equal protection clauses of the 14th amendment carte blanche. So if they want to say that equal protection means that a State cannot have an all-male military school, that's what it means.

When Chief Justice Charles Evans Hughes said, "We're under the Constitution, but the Constitution is what the Court says it is," someone said he was wrong. Well, he is right as a practical matter, at least. That shouldn't be the way it is, but that surely is what the case is now. And the only way we are ever going to return legislative power to the legislatures and take it out of the courts is by an amendment that limits the 14th amendment to something specific. What it was supposed to mean was no racial discrimination. Make it mean that——

Mr. BRYANT. OK.

Mr. GRAGLIA [continuing]. And you have something.

Mr. BRYANT. Thank you. Let me go down to Mr. Henderson.

Mr. HENDERSON. OK.

Mr. BRYANT. Again, my basic question is, what does that provision in the Constitution that talks about good behavior mean in relation to impeachment?

Mr. HENDERSON. I think it is very difficult, Mr. Bryant, to give you a clear and simple answer about what that phrase means. I mean, as you say, there is a body, a limited body, of law which has sought to interpret it. But, obviously, there's a certain inherent vagueness to the term and the way it's been constructed.

I will say this, though, going back to your original point, which was, how do you as a Representative respond when a majority of your constituents says that a particular judge has either engaged in activity or hasn't engaged in activity which has impacted them, and it's a real problem, or when a judge tries to impose, for example, as you cited as an example, tax increases to implement some sort of constitutional solution or remedy to a problem, and Professor Graglia cited the example of the Federal judge in Missouri who has sought to impose taxes to benefit children who have been adjudged victims of discrimination in their educational system.

I can only remind you, there's a provision in the bill that was discussed yesterday, H.R. 1252, that seeks to limit the ability of Federal judges to impose tax relief, and it's based on the assumption that judges exceed their authority when, in fact, they move to impose taxes on the citizens. It's a rare—it's rarely used, as you know, as a power.

But immediately after *Brown* was decided by the Court, a number of school districts sought to frustrate the implementation of *Brown* by choosing not to levy taxes on the citizens of that State, so that they would not have the resources needed to implement the constitutional remedy that the Court had determined. The Supreme Court, in a decision called *Griffin* v. *Prince Edward County Board of Education,* a 1964 decision, upheld the ability of the courts to impose taxes to address those kinds of specific problems. This is not a power that has been used very often. It's certainly not a power that's been abused.

But where you've demonstrated that there is little option in order to carry out a remedy to address a constitutional violation other

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than to levy the power of taxes on citizens, it seems to me that—and the Court has held—that that's a reasonable and necessary step to take. We're not advocating that every judge should resort to levying taxes for every—to develop remedies to every violation he or she identifies, but those are clearly examples where such power is needed.

And so the provision in H.R. 1252 is especially troubling because it amounts to a level of court-stripping. It's taking away from the Federal judges now the power that they have, and it's intended to respond to a particular case that people think may constitute a form of judicial activism or abuse.

Mr. BRYANT. Thank you.

Mr. Pilon.

Mr. PILON. Yes. Here I'm afraid I've got to come down on Lino's side for a change. He's alluding, of course, to the *Jenkins* cases, three of which have made it to the Supreme Court.

This issue of judicial taxation or structured remedies is an extremely troubling issue under our Constitution; there is no power to tax. I testified on hearings on the subject of judicial taxation last year, and out of those hearings came the part that is included in the bill that you discussed yesterday. And it seems to me——

Mr. BRYANT. Mr. Pilon, isn't the Supreme Court going to rule that unconstitutional?

Mr. PILON. Unfortunately, Lino's right; the Supreme Court has, except for the last time when it pared it back substantially, in *Jenkins III*——

Mr. BRYANT. Aren't they going to rule this unconstitutional, if we pass it?

Mr. PILON. Oh, I—that's a good question. It's conceivable that they could, although—because it does strip the courts of a certain power, but it strips them of a power they never had to begin with on my reading of the Constitution. This idea of judicial taxation is an extraordinary—I mean, if there was anything that was at the center of the founding of this country, it was the issue of taxation; no taxation without representation. Clearly, the courts are not representative. You people are the representatives. If you want to tax—the proper role of the judge in this case is to say, "Look, do it the right way or abolish this public institution, whether it's a jail, a school, or whatever the case may be. But I am in no position to order taxes." I mean, once the judiciary goes down that road, the implications are absolutely profound and mindboggling. And I think that this is the kind of thing that you should venture out into, and let the Court then—let the Court decide, no, we won't do it, and let it point to that provision in the Constitution that authorizes the judiciary to impose—or to tax.

Mr. BRYANT. But my point is—does anybody believe that the good behavior language in the Constitution is an additional basis for impeachment? That's my question.

Mr. PILON. That—I'm sorry?

Mr. BRYANT. The good behavior language in the Constitution, article III, is a basis, in addition to high crimes and misdemeanors, for impeachment.

Mr. PILON. It is one of those—it is one of those deliberately ambiguous areas, in my judgment, that leave it up to the judgment of people like you.

Mr. GRAGLIA. It's in the Constitution. So there's no question that it's a basis for removal. Judges have to have good behavior. Now what do you mean by good behavior? If a judge behaves as Congressman Bono indicated, or if, indeed, a judge does go insane—you said he was saying insane things, and we've had examples—Judge Pickering was an early example. Like other people, a judge can go insane and behaves totally inappropriately; even though he has committed no crime, clearly is, or should be, removable on that basis.

Insofar, however, as we are trying to remove judges because of the content of their rulings, that will be extremely difficult and probably inappropriate.

Mr. COBLE. I'm going to get to you, Judge. I was just going to say to the gentleman from Tennessee, Alexander Hamilton, I think, probably thought so, but that will be for another day.

Judge.

Judge RADER. Ultimately, the question of what is an impeachable offense lies with Congress. They will set that standard under the Constitution. Congress has wisely refused to venture into the area of impeachment with regard to judicial opinions and judicial results. Since early in our Republic when Samuel Chase was acquitted after being impeached, a very wise decision, Congress has never ventured to use impeachment when it disagreed with a judicial decision.

I've heard and sat here and listened with some pain to charges being lodged against some of my colleagues. I hope that any inappropriate conduct, it's recognized, can be redressed under the Judicial Discipline and Tenure Act of 1978, which gives judicial councils the injunction to do that, which they have, I believe, undertaken diligently to do.

I hope that any individual instances of human frailty—and every branch will have some human frailty—are not the justification, however, for charging that the judicial branch has not carried out its responsibility of protecting individual rights and enforcing the laws and Constitution of the United States. I think the Judicial branch can stand alongside Congress as very proud of the job that it's done in protecting individual freedoms, and I think that we should keep our eye on that larger context of the institutional integrity of our Constitution, rather than varying therefrom to focus too much attention on individual variances from that high standard.

Thank you, Mr. Chairman.

Mr. GRAGLIA. If I might comment on that, as you referred to Alexander Hamilton, who, indeed, was our original theorist of judicial review—as you know, it's not explicitly provided for in the Constitution, as I would expect it to be, like the power, the veto power of the President, if it really were thought through and provided for. But, nonetheless, Hamilton proposed it, was a theorist of it, and he said, look, we need this as a means of preventing usurpation of power by the legislature. To which the question arises: "But then

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what happens if there is usurpation of power by the judiciary?" And he said, "You can impeach them."

Well, I don't know if that was entirely candid. It certainly was unrealistic. When Jefferson tried it, it didn't work, causing Jefferson to conclude, quite rightly, that "impeachment is a farce," he said, "not even a scarecrow," in his terms.

If we had a practice of readily impeaching justices for what we consider usurpation of power, it would be a significant limitation on judicial power but we have not done that. And the idea of impeaching judged on the basis of how they interpret a law or a constitution is almost always such an arguable question that it's very difficult and probably inappropriate.

Mr. COBLE. The late William Delahunt has joined us. Bill, you have questions you want to put to these people?

Mr. DELAHUNT. Yes, I'll make it brief, and I'll direct the first one to Judge Henderson, and then the second one to Mr. Henderson, Mr. Pilon, and Mr. Rader. I'll give Professor Graglia an opportunity to catch his breath.

But earlier you made a comment—and I don't want to take your intent and impose my own—but you related your feeling or your opinion that Congress ought to be very careful in interfering in the structure and the administration of justice. And my point was—or my point is, rather—the testimony that we heard this morning—and, again, I'm not focused on the particular case, and I'm not in any way alluding to that particular case, and, in fact, I think I tried to make clear the point that counsel for the defendant was not here.

But in the area, for example, of a rule which would bring into—which would be parallel to the assignment of cases as they come into the Federal system, that's done on a random basis, I would think that Congress, ought to consider a rule bringing petitions for habeas corpus emanating from State cases into a similar system, where they would be randomly selected. And I just wonder if you have an opinion on that.

Mr. BRYANT. Would the gentleman yield quickly?

Mr. DELAHUNT. Yes.

Mr. BRYANT. Just as a clarification, I think there has been a misconstruction of the facts in that particular case because, just for whatever it's worth—and whether we want to change a rule and require this, I think most courts have a selection, a random selection process already in place. But to clarify the *Nixon* case, Judge Nixon was not the Chief Judge at the time this agreement was made. He had the unconstitutional prisons condition lawsuit in his court. The then-Chief Judge in that district said, "Why don't you just take these habeas cases, too, since you've got that case."

Mr. DELAHUNT. So all of the death penalty cases ended up in front of——

Mr. BRYANT. That judge at that point. Judge Nixon subsequently, rotated to become Chief Judge, but he did not, as the Chief Judge, assign all the cases to himself. That was by agreement.

Mr. DELAHUNT. I'm glad that I'm informed. But is there a—and this is for my education—is there a process by which habeas cases are randomly assigned as if—emulating the State courts—as if

they had just on the first instance had entered into the Federal system?

Mr. HENDERSON. Thank you, Mr. Delahunt. I understand your question; I'm not sure that I can answer it. I believe there are rules of procedure within the jurisdictions of the circuit courts for assigning cases as they come for consideration before those courts. Whether there is a uniform rule that has been adopted among all the circuits that would apply across the board, I don't know the answer to that.

Mr. DELAHUNT. Did you—let me interrupt——

Mr. HENDERSON. I would not support the idea of Congress imposing a rotational requirement on the courts for the consideration of these cases, even though I understand the purpose of that effort is well-intentioned. It is intended to ensure, you know, random rotation and selection.

My own view is that the courts themselves are better able to determine the body of cases before them, and I think that there are instances where the judges who will make assignments and the procedure that their peer judges have established is the better approach to take.

You cited in the beginning of your question my view of congressional restraint in affecting procedures of the court, and you are correct; I do believe that the Founding Fathers and the system they've developed, even where I may disagree with individual decisions, is itself a system that has tended to work, and there are self-corrective devices, even——

Mr. DELAHUNT. But you would concede that Congress does have authority in terms of rulemaking?

Mr. HENDERSON. Certainly I think Congress has the authority to appoint judges and to adopt rules that may affect cases that come before those judges. And, again, whether—you may have the authority to do so and then choose not to exercise it, maybe based on the considerations of some of the issues that we've talked about today.

Mr. DELAHUNT. I just have one other question, and I heard the dialog concerning taxation, and Mr. Pilon expressed some rather strong sentiments. And I just would pose this question: In terms of judicial power, the reality is that if the court does not have the capacity to fashion an appropriate remedy, don't we have a situation where court orders simply can be ignored? I agree with those on the panel and others who advocate that it should be the ultimate remedy, but I would expect and suspect that in many cases it is considered a remedy of ultimate resort.

Judge RADER. Mr. Delahunt, you are talking about congressional rules that might affect the assignment of cases. We are separate and equal branches. It seems that the procedural prerogatives of the judicial branch probably ought to lie with the judicial branch. I don't suppose it would be an appealing idea for you to have another branch setting your procedures. I don't suppose you would like the President to tell you the order for hearings and what bills you can have hearings on, and which order for Congressmen to ask questions. I suppose you would be equally offended if the judicial branch were to try to tell you how to run your day-to-day business. Similarly, I think that interbranch respect and comity would coun-

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sel very strongly that Congress would ask itself very sincerely whether it wished to dictate in that kind of detail how the Judicial branch runs its business.

Mr. DELAHUNT. Thank you.

Mr. Pilon.

Mr. PILON. Yes, the only problem with what Judge Rader has just said is that there is authority under article III, section 2, of the Constitution to control some of the procedures—if not the procedures, certainly the case law of the courts. I'm trying to—I'm struggling to find it.

Mr. DELAHUNT. I think I'm familiar with the provision——

Mr. GRAGLIA. It says, "such regulations and exceptions as the Congress shall make."

Mr. PILON. Yes.

Mr. DELAHUNT. Right. I think that——

Mr. PILON. So it isn't quite coequal.

Mr. DELAHUNT. Just reclaiming my time for a moment, I think that Mr. Rader was making the point that, in terms of comity——

Mr. PILON. Sure.

Mr. DELAHUNT [continuing]. It is a more—it's a preferential route to take.

However, I was reviewing last night a report put out by the Congressional Research Service, and it was fascinating in terms of the history, given the tug and the pull and the invitation, if you will. And if it would be, in fact, supportive of public confidence in terms of what occurs within the judicial system, I would respectfully invite the judiciary to take a look particularly at the rule, which I thought was universally applicable, of random assignment. I think, again, that gives confidence to the public at large. So please accept that as an invitation of a freshman member of a subcommittee sitting here.

Mr. PILON. To go back to your question, though, that you put to me about——

Mr. DELAHUNT. On taxation.

Mr. PILON [continuing]. Judicial taxation or whether the courts should be free to fashion remedies, even affirmative remedies, perhaps under its power of equity, which would seem to me the only way it could be done——

Mr. DELAHUNT. Right.

Mr. PILON [continuing]. It's an extraordinarily vexing issue. To be sure, courts can fashion affirmative remedies when you're dealing with civil cases such as domestic law cases, divorces, child support, and things of that sort. When you move from that, however, to public law questions, it seems to me that you get into this awful question of judicial taxation, and the proper response there, I think, is to avoid at all cost moving toward principles of equity by way of remedies, and, in effect, allow the court to say to the political institution, to take a stock case, "If you're going to imprison these people, they have to be imprisoned under humane conditions. You cannot simply imprison them and feed them once a week because you're unwilling to raise taxes." So the proper answer is, let them out of prison until you're prepared to imprison them under humane conditions——

Mr. DELAHUNT. You've spawned one further question, and if I can indulge my friend from North Carolina to pose it—I think it was back in January, the first hearing of this committee was on the balanced budget amendment. And there was a professor from, I think, the University of Southern California, and I asked him the question: in the event of a budget impasse between the President and Congress, in an attempt to comply with the provisions of the balanced budget amendment, it would seem that the only recourse would be to allow some activist judge to resolve that impasse, and he agreed with me. And I'd be interested in your response because I was arguing that what we were doing as Congress was conceding legislative prerogatives and legislative authority to the other branches, and most likely the judicial branch.

Mr. PILON. Congressman Delahunt, coming from the Cato Institute, it will not surprise you to hear me say that that is precisely the wrong answer. [Laughter.]

There are worse things than having the Government shut down. [Laughter.]

Mr. DELAHUNT. I see. [Laughter.]

Thank you very much, Mr. Pilon.

Mr. COBLE. Mr. Pilon, there are many people in my district who said those very words to me back when they were shut down. When I say "we," I think we and the President jointly did that, but we heard the same thing.

Folks, this has been a good hearing today because of the presence of three panels and because of the participation in our subcommittee. For that, I thank you.

Judge Rader, you appear to be a humble judge. So having said that—and this is subject to interpretation—you said that you had heard some unkind things said about some of your colleagues. I guess that's subject to interpretation, but I guess, because we—Mr. Bryant says we hear a lot of unkind things said—or Mr. Bono said it—maybe we're immune to it, but it hadn't seemed all that unkind to me. And I share the view of some of you all, and I'm going to remove my—well, I'll keep my impartial hat on, but I have problems, my friends, with lifetime appointments to anything. The Constitution I don't think says "life." I just think it says "tenure during good behavior," which of course transfers into lifetime tenure. And, Judge, I don't mean that personally against you or Judge Centell, but lifetime appointments to anything bother me.

Having said that, I want to thank you all again, and I want to announce that the oversight hearing on judicial misconduct and discipline is hereby concluded. The record will remain open, however, for 1 week.

Thank you all again for your cooperation, and we stand adjourned.

[Whereupon, at 1:41 p.m., the subcommittee adjourned.]

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