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JUDICIAL ACCOUNTABILITY MUST SAFEGUARD, NOT THREATEN, JUDICIAL INDEPENDENCE: AN INTRODUCTION

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This issue of the *Denver University Law Review* is devoted to an important subject: judicial accountability. Properly understood, judicial accountability is a fundamental democratic requirement of our federal and State governments. Put simply, judges must be accountable to the public for their constitutional role of applying the law fairly and impartially. Judicial accountability, however, is a concept that is frequently misunderstood at best and abused at worst. It has become a rallying cry for those who want in reality to dictate substantive judicial outcomes. The notion of accountability is superficially attractive: judges who reach outcomes that part ways with the will of the majority—often mislabeled "activist" judges—should be held "accountable."

This simplistic understanding of accountability—judicial accountability for the majority's desired substantive outcomes—ignores the role of the judiciary and indeed the very structure of our democratic governments, State and federal. Worse, this perversion of the concept of judicial accountability threatens to undermine the safeguards of democracy and liberty that were so brilliantly conceived by those who first designed our governmental institutions and drafted our Constitution. In short, "[p]opulist, substance-based accountability for judges is precisely what the Founders feared[.]"[1] The Framers placed at the core of the judiciary's design the concept of judicial independence as a means to guarantee the Rule of Law. Judicial independence is the vital mechanism that empowers judges to make decisions that may be unpopular but nonetheless correct. In so doing, the judiciary vindicates the principle that no person or group, however powerful, is above the law. And it gives life to the promise that the Rule of Law safeguards the minority from the tyranny of the majority.[2]

Alexander Hamilton, one of the Framers of the United States Constitution, wrote in *The Federalist No. 78* to defend the role of the judiciary in the constitutional structure. He emphasized that "'there is no liberty, if the power of judging be not separated from the legislative and

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1. Rebecca Love Kourlis & Jordan M. Singer, *A Performance Evaluation Program for the Federal Judiciary*, 86 DENV. U. L. REV. 7, 8 (2008).

2. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, Ch. VI (Henry Reeve trans., 1835).

executive powers.' . . . [L]iberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments."[3] Only with judicial independence can the reality and the appearance of zealous adherence to the Rule of Law be guaranteed to the people. As former U.S. President Woodrow Wilson wrote, government "keeps its promises, or does not keep them, in its courts. For the individual, therefore, . . . the struggle for constitutional government is a struggle for good laws, indeed, but also for intelligent, independent, and impartial courts."[4]

This principle undergirds the place of the judiciary in the United States. The Founders of the United States recognized that it is essential to the effective functioning of the judiciary that it not be subject to domination by other parts of the government. To accomplish this goal, the United States Constitution established an independent federal judiciary by separating the law-making function of the legislative branch from the law-applying role of the judicial branch. This separation of the legislative and judicial powers has proven essential in maintaining the Rule of Law. When the roles of lawmaker and judge are played by different state actors, the danger of government arbitrariness is greatly diminished. When the power to make laws is separated from the power to interpret and apply them, the very foundation of the Rule of Law—that controversies are adjudicated on the basis of previously established rules—is strengthened.

An independent judiciary requires both that individual judges are independent in the exercise of their powers, and that the judiciary as a whole is independent, its sphere of authority protected from wrongful interference by the other two branches of government. Judicial independence has both individual and institutional aspects. As for the independence of individual judges, there are at least two avenues for securing that independence: First, judges must be protected from the threat of reprisals, so that fear does not direct their decision-making. Second, the method by which judges are selected, and the ethical principles imposed upon them, must be constructed so as to minimize the risk of corruption and outside influence. The first endeavor is to protect judicial independence from outside threats. The second is to ensure that judicial authority is not abused, and it is the core concern of the enterprise of judicial accountability.

I regret that threats to judicial independence seem to be occurring with record frequency. Members of Congress have faulted the courts for their decisions on various issues. There have been demands for "mass

3. THE FEDERALIST NO. 78, at 425 (Alexander Hamilton) (E.H. Scott ed., William S. Hein & Co. 2002).

4. WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 17 (Columbia Univ. Press 1911).

impeachment," stripping the courts of jurisdiction to hear certain types of cases, and using Congress's budget authority to punish offending judges. The pages that follow contain some of the most egregious examples. Judge Edwin Felter discusses South Dakota's 2006 "Jail for Judges" Initiative, which would have made the State's judges liable in criminal and civil actions for judicial acts deemed improper by dissatisfied litigants.[5] Former Colorado Supreme Court Justice Rebecca Love Kourlis and Jordan Singer cite House Majority Leader Tom DeLay's remarks that "the time will come" for federal judges who refused to restore Terri Schiavo's feeding tube "to answer for their behavior" and that the federal judiciary was "arrogant, out-of-control, [and] unaccountable."[6] This was after the federal courts affirmed the state courts in the Terri Schiavo case,[7] under the review required by Congress's one-time only statute.[8] Unfortunately there are many more examples.

In all the federal courts, including the Supreme Court, death threats have become increasingly common. Judge Greer, who handled the Schiavo case for over a decade, received many menacing e-mails and death threats. We've seen this before—Justice Hugo Black often wore a chest protector provided by the Secret Service when he visited Birmingham; my former colleague Harry Blackmun got death threats because of *Roe* v. *Wade*, and his living room window was once shattered by a gun shot. Recently, we saw a U.S. lawmaker go as far as to suggest that completed acts of violence against judges and their families were motivated by ideological disagreement with their judicial decisions.[9]

The exercise of independent judging in the face of such pressure requires great courage. Judges are called upon to stand firm against both the tide of public opinion and the power of the legislative and executive branches. A compelling example can be found in the 1954 decision of the Supreme Court in *Brown* v. *Board of Education*,[10] which declared that separate educational facilities for children of different races are inherently unequal. The case provoked a firestorm of criticism in much of the country. The unpopular decision was, however, the necessary first step in desegregating public institutions in the United States. It was an exercise of accountability to the Rule of Law over the popular will.

As you review the articles that follow, it is important to locate the notion of judicial accountability in this larger context. Keep in mind the

5. Edwin L. Felter, *Accountability in the Administrative Law Judiciary: The Right and the Wrong Kind*, 86 DENV. U. L. REV. 157, 159 (2008).

6. Kourlis & Singer, *supra* note 1, at 8 n.s.

7. Schiavo *ex rel.* Schindler v. Schiavo, 357 F. Supp. 2d 1378 (M.D. Fla. 2005), *aff'd*, 403 F.3d 1223 (11th Cir. 2005).

8. Act of Mar. 21, 2005, Pub. L. No. 109-3, 119 Stat. 15 (2005) ("An Act For the relief of the parents of Theresa Marie Schiavo.").

9. Editorial, *The Judges Made Them Do It*, N.Y. TIMES, Apr. 6, 2005, at A22, *available at* http://www.nytimes.com/2005/04/06/opinion/06wed1.html.

10. 347 U.S. 483 (1954).

cornerstone of judicial independence in our democratic governments, state and federal, and recognize that there are real, mounting threats to that independence. There are sound ways to achieve judicial accountability while safeguarding the role of our courts, accountability consistent with the larger role of the judiciary in our democratic society. True judicial accountability advances judicial independence and the paramount Rule of Law. "Accountability and independence are two sides of the same coin: accountability ensures that judges perform their constitutional role, and judicial independence protects judges from pressures that would pull them out of that role."[11] Indeed, as Kourlis and Singer suggest, the enterprise of accountability may greatly safeguard judicial independence; "[e]mbracing accountability for fair and efficient processes may help stave off irresponsible demands for accountability for decisional outcomes."[12]

True judicial accountability furthers another necessary characteristic of a functioning judiciary: judicial integrity. An independent *and* honorable judiciary is indispensable to the Rule of Law. Alexander Hamilton captured this necessity well when he wrote that a "steady, upright, and impartial administration of the laws" is essential because "no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be the gainer today."[13] If judges are to be the independent guardians of Rule of Law values, they must be incorruptible. Judges are entrusted with ultimate decisions over the life, freedoms, duties, rights, and property of citizens. But judges will never win the respect and trust of the citizens if they are subject to corrupt influences. Whenever a judge makes a decision for personal gain, or to curry favor, or to avoid censure, that act denigrates the Rule of Law. A third value may be advanced through judicial accountability properly construed: judicial competence. A fundamental value of the Rule of Law is that judicial decisions are not made arbitrarily, but through a process of reasoned decision making. The Rule of Law therefore requires that "official decisions be justified in law, and therefore be reasoned and nonarbitrary with respect to general legal standards."[14]

Independence, integrity, and competence, then, are the hallmarks of a judiciary committed to upholding the Rule of Law and they are the principles for which a judiciary should be held accountable. In the pages that follow, the contributors to this issue present and debate proposals to advance judicial accountability as experienced in our federal, State, and administrative courts.

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11. Sandra Day O'Connor & RonNell Anderson Jones, *Reflections on Arizona's Judicial Selection Process*, 50 ARIZ. L. REV. 15, 23 (2008).

12. Kourlis & Singer, *supra* note 1, at 9.

13. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 3, at 430.

14. Steven J. Burton, *Particularism, Discretion, and the Rule of Law*, *in* THE RULE OF LAW: IDEAL OR IDEOLOGY 178, 187 (Allan C. Hutchinson & Patrick Monahan eds., 1987).

Leading off, Kourlis and Singer propose a framework for a federal judicial performance evaluation program.[15] Because state judicial performance evaluation programs have been so successful, they argue, federal judges could equally benefit from them. Implementing a federal judicial performance evaluation program, they conclude, could preserve judicial independence, provide information for judges to improve their performance, and increase the public's confidence in the courts.

Next, using principles derived from international Rule of Law initiatives and international economic development, Norman L. Greene considers the relationship between fair and impartial courts and economic development in the United States.[16] Greene argues that state court judicial elections in the United States violate the Rule of Law and lead to adverse economic effects at home in much the same way they lead to adverse economic effects abroad. For the welfare of the economy, Greene concludes, Americans should eliminate judicial elections.

Washington State University Professor David C. Brody then analyzes the methods by which states assess the effectiveness of their judicial performance evaluation programs.[17] Brody surveys the conventions of judicial performance evaluations, and examines the impact that evaluations have on judicial accountability. He presents the results of a case study on the importance of methodology in judicial performance evaluations, and concludes that maintaining effective and trustworthy judicial performance evaluation programs will result in a desirable balance of judicial independence and judicial accountability.

Colorado administrative law judge Edwin L. Felter, Jr., then discusses and evaluates several forms of accountability in the administrative law judiciary, and compares them with prevalent forms of accountability in the judicial branch.[18] Felter argues that codes of judicial conduct, as well as formal enforcement mechanisms, work together to maintain a balance of independence and accountability in the administrative law judiciary.

Next up is James Bopp, Jr., who argued *Republican Party of Minnesota v. White*,[19] and Josiah Neeley. They probe commonly-cited criticisms of privately funded judicial election systems, and identify potential weaknesses of publicly funded judicial election systems.[20] Bopp and

15. Kourlis & Singer, *supra* note 1.

16. Norman L. Greene, *Perspectives from the Rule of Law and International Economic Development: Are there Lessons for the Reform of Judicial Selection in the United States?*, 86 DENV. U. L. REV. 53 (2008).

17. David C. Brody, *The Use of Judicial Performance Evaluation to Enhance Judicial Accountability, Judicial Independence, and Public Trust*, 86 DENV. U. L. REV. 115 (2008).

18. Felter, *supra* note 5.

19. 536 U.S. 735 (2002).

20. James Bopp, Jr. & Josiah Neeley, *How Not to Reform Judicial Elections: Davis, White, and the Future of Judicial Campaign Financing*, 86 DENV. U. L. REV. 175 (2008).

Neeley argue that common criticisms of private funding are hyperbolic, and question the constitutionality of bans on personal solicitation of funds by judicial candidates, as well as the constitutionality of certain provisions of publicly-funded judicial elections. They conclude that restrictions on judicial candidates' speech will not effectively reform judicial elections.

Taking on Bopp and Neeley, Georgetown University Professor Roy A. Schotland argues that the personal solicitation of campaign funding by judges is problematic.[21] Schotland identifies "six fatal flaws" with Bopp and Neeley's argument, examining judges' personal solicitation of campaign funds in historical, constitutional, and pragmatic contexts.

Finally, former Tennessee Supreme Court Justice and current University of Tennessee Professor Penny J. White examines John Grisham's fictionalized account of a corporate defendant's scheme to oust a state supreme court justice and replace her with an appointee more friendly to the defendant's case.[22] White argues that situations similar to Grisham's fiction are not only plausible, but have repeatedly occurred. An "appeal to the masses" through the medium of fiction, she concludes, could spark greater public concern with the current state of the courts.

I am hopeful that some of these interesting proposals and ideas will help us stem the tide of threats to the independence of our judiciaries. The fair and effective functioning of our democracy demands as much.

21. Roy A. Schotland, *Six Fatal Flaws: A Comment on Bopp and Neeley*, 86 DENV. U. L. REV. 233 (2008).

22. Penny J. White, *"The Appeal" to the Masses*, 86 DENV. L. REV. 251 (2008).