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THE ARLIN M. AND NEYSA ADAMS LECTURE ON CONSTITUTIONAL LAW

TO ADMINISTER JUSTICE

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I count it a great privilege to present the inaugural Arlin and Neysa Adams Lecture on the Constitution. The privilege has two aspects:

The first aspect is that it provides a renewed opportunity to give public thanks for the generosity and the devotion to the public weal that have always been Arlin and Neysa's trademark. And for those of us who labor in the law, this is an occasion on which we can—without fear of the red light that terminates oral argument in the circuit courts of appeals and in the Supreme Court—recognize the Judge as one whose eighteen years on the Third Circuit were a model of scrupulous craftsmanship in service to the Constitution. Further, here in this academic setting, we can acknowledge the contributions that Arlin Adams—as judge, as scholar, and as teacher—has made to our understanding of the Constitution, and, most particularly, of the First Amendment's religious clauses.

The second aspect is to bear witness to the significance of this new lectureship. The very act of establishing a lectureship on the Constitution is a signal event. It betokens America's continuing commitment to the liberty values animating the Declaration of Independence, and to the structures of governance put in place by the delegates to the Constitutional Convention in order to "secure the blessings of Liberty to ourselves and our Posterity."

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* Judge, United States District Court, Eastern District of Pennsylvania. This Essay was presented orally, at the Temple University James E. Beasley School of Law, on February 5, 2007, as the first Arlin M. and Neysa Adams Lecture in Constitutional Law. Four good friends—Loren AliKhan, Anisha Dasgupta, R. Craig Green, and Benjamin Maxymuk—kindly read this Essay in draft and gave very helpful comments, for which I am grateful. As published here, the text is substantially as I delivered it. Certain footnotes have been expanded, however (*see, e.g.*, notes 18 and 39, *infra*), and a few footnotes have been added (*see, e.g.*, notes 12, 29, and 30, *infra*).

I have titled this lecture "To Administer Justice," and just why I have done so will appear in a few moments. First, I want to explain what I intend to do. I want to talk about what makes for good judging and what cuts against good judging. I will focus on judging because construing the Constitution is so very largely a judicial task. This is not to say that other branches of government have no role in deciding what the Constitution requires. In 1861, Abraham Lincoln, as the incoming President, decided that the Constitution did not authorize states to secede, and also—and this was a matter the departing President, James Buchanan, had been uncertain about—that the Constitution authorized the President, indeed obligated him, to wage war to save the constitutionally ordained union. Lincoln did not go to court to get approval. But the great mass of constitutional decision making is judicial. As John Marshall reminded his fellow countrymen in *Marbury v. Madison*: "It is emphatically the province and duty of the judicial department, to say what the law is."[1]

To begin, I intend briefly to recall several cases—some of which arose in this Circuit and some of which went to the Supreme Court—that address two related and very important themes: constitutional constraints, imposed by the First Amendment's religious clauses, on ceremonial exercises in public schools, and on the content of course offerings in public schools. As noted a moment ago, these are matters that Arlin Adams has given thought to for many years. I would like to make it clear at the outset that my object here is not to provide substantive enlightenment. That would be impertinent, since, for this audience, the cases that went to the Supreme Court are reasonably well-known. Rather, my object is to provide illustrations both of excellent judging and of very deficient judging. This will suggest that even life tenure is not, by itself, a guarantee of good results: intelligence, common sense, hard work, and a strong sense of responsibility are also called for if a judge is to "administer justice" in proper fashion. The second part of the lecture will focus on external impediments to the proper functioning of the judicial process: namely, impediments that can be put in place by the political branches—Congress and the President.

I.

The first case to be discussed arose in a small Pennsylvania town in the middle of the Depression. The case was an early listing on the docket of the most junior judge on the District Court for the Eastern District of Pennsylvania, Albert Branson Maris, the first judge President Franklin Roosevelt had the opportunity to name to our district court. Judge Maris, a graduate of this school, was sworn in on July 1, 1936. On that day he took the historic oath, or affirmation, laid down in 1789, in section 8 of the First Judiciary Act, that every Supreme Court Justice and all judges of the "inferior" federal courts have been required to take "before they proceed to execute the duties of their respective offices":

1. 5 U.S. (1 Cranch) 137, 177 (1803).

> I will administer justice without respect to persons, and do equal right to the poor and to the rich, and . . . I will faithfully and impartially discharge and perform all the duties incumbent upon me as a _____ judge according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States.[2]

And thus commenced one of the longest and most revered judicial careers—two years on the district court and forty-eight years on the Court of Appeals for the Third Circuit—in the history of the republic.

The early case on Judge Maris's docket was brought by Walter Gobitis and his two school-age children, Lillian and William. The defendants were the members of the board of directors of the Minersville public schools. Lillian, age thirteen, and William, age twelve, were, like all American children, required by state law to attend school. But in 1935 Lillian and William were expelled from the Minersville public schools. Their infraction consisted in refusing to comply with a directive of the school system's board of directors that on each school day all students and teachers participate in a ceremony of saluting the flag. The members of the Gobitis family were Jehovah's Witnesses. For a Jehovah's Witness, saluting the flag would have been a sacrilege—a breach of the command in Exodus that "Thou shalt have no other gods before me" or bow down to "any graven image, or likeness of any thing."

The suit brought by Walter, Lillian, and William Gobitis contended that the flag salute mandated by the school system's board of directors abridged the freedom of worship protected by both the Pennsylvania and the United States Constitutions. The plaintiffs sought a decree enjoining the defendant school directors from enforcing their mandate. The school directors moved to dismiss the Gobitis complaint. On December 1, 1937, Judge Maris denied the motion:

> Liberty of conscience means liberty for each individual to decide for himself what is to him religious. If an individual sincerely bases his acts or refusals to act on religious grounds they must be accepted as such and may only be interfered with if it becomes necessary to do so in connection with the exercise of the police power, that is, if it appears that the public safety, health or morals or property or personal rights will be prejudiced by them. To permit public officers to determine whether the views of individuals sincerely held and their acts sincerely undertaken on religious grounds are in fact based on convictions religious in character would be to sound the death knell of religious liberty. To such a pernicious and alien doctrine this court cannot subscribe.
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> In the present case the bill avers that the refusal of the minor plaintiffs to salute the flag is based on conscientious religious grounds. It seems obvious that their refusal to salute the flag in school exercises could not in any way prejudice or imperil the public safety, health or morals or the property or personal rights of their fellow citizens.

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2. The 1948 codification of the Judicial Code abbreviated the closing phrase that commences "according to the best of my abilities and understanding," substituting the terser phrase "under the constitution and laws of the United States." 28 U.S.C. § 453 (1948).

> Certainly no such suggestion was made by the defendants at the argument. However, in the view we have taken, such prejudice or peril, if it exists, is a matter of defense. Consequently we must hold on this motion that the action of the minor plaintiffs in refusing for conscience sake to salute the flag, a ceremony which they deem an act of worship to be rendered to God alone, was within the rights of conscience guaranteed to them by the Pennsylvania Constitution. The conclusion is inescapable that the requirement of that ceremony as a condition of the exercising of their right or the performance of their duty to attend the public schools violated the Pennsylvania Constitution and infringed the liberty guaranteed them by the Fourteenth Amendment.[3]

Thereafter, Judge Maris granted the injunctive relief sought by the plaintiffs.

Two years later, in 1939, Judge Maris's decree was affirmed by the Third Circuit. The appellate ruling was, in my respectful view, correct. But Judge William Clark's opinion—the court's explanation of its correct appellate ruling—was not, in my respectful view, one of the Third Circuit's better efforts. The opinion was a confection of banal, pompous, and maudlin sermonizing. "These little children ('suffer them') are asking us to afford them the protection of the First Amendment . . . ."[4] Into this mix, disciplined legal analysis was not encouraged to intrude.

In the spring of 1940, the Supreme Court reversed, sustaining the obligatory flag salute and the expulsion of Lillian and Walter Gobitis. One Justice—Harlan Fiske Stone—dissented.[5]

Three years later, in 1943, in the middle of World War II, the Supreme Court, in *West Virginia State Board of Education v. Barnette*,[6] overruled its 1940 *Gobitis* decision. The vote was six to three, Justice Jackson writing for the Court: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[7] The decision, construing the Constitution as Judge Maris understood it, was announced on June 14, Flag Day.

In the early nineteen sixties, two decades after *Barnette*, the Supreme Court, in two cases, ruled that it was unconstitutional for public schools to start the day with prayer,[8] since this amounted to an establishment of religion forbidden by the First Amendment, made applicable to the states via the Fourteenth Amendment. In the second of the two cases, *Abington School District v.*

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3. Gobitis v. Minersville Sch. Dist., 21 F. Supp. 581, 584 (E.D. Pa. 1937).

4. Minersville Sch. Dist. v. Gobitis, 108 F.2d 683, 684 (3d Cir. 1939).

5. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 601 (1940) (Stone, J., dissenting).

6. 319 U.S. 624 (1943).

7. *Id.* at 642.

8. Engel v. Vitale, 370 U.S. 421, 424 (1962); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 205 (1963). In *Schempp*, the Court was at pains to point out that its decision did not preclude the inclusion in a public school curriculum of the study of religion, including the Bible, provided such material was "presented objectively as part of a secular program of education." 374 U.S. at 225.

Schempp,[9] the lawyer for the Schempps, the family challenging the prayer, was the late Henry Sawyer of the Philadelphia bar. In 1999, in a moving memorial tribute to Sawyer, Arlin Adams described his friend as one who "represented the very best in America."[10]

In 1969, Arlin Adams was nominated and confirmed as a circuit judge. On October 2, 1969, he took the time-honored oath to "administer justice" and ascended the bench.

Ten years later, in 1979, Judge Adams was a member of a circuit court panel called on to review a decision of the District Court of New Jersey ruling that a course presented in certain New Jersey public schools was religious in character and hence forbidden by the Establishment Clause.[11] The course, offered on an optional basis in five New Jersey high schools, was called "Science of Creative Intelligence – Transcendental Meditation," more familiarly known as SCI/TM. The defendant sponsors of SCI/TM and the defendant school officials denied that SCI/TM, which called itself a "science," was a religion. Thus, the case captioned *Malnak v. Yogi* called on the court to untangle a most unusual controversy—one in which members of a group challenged as engaging in religious activity rejected that characterization of the beliefs they were trying to promote. While issues touching on whether a particular belief system was religious in character had on occasion arisen in other courtrooms, I know of no case prior to *Malnak* in which adherents of a questioned belief system felt compelled by the dynamics of litigation categorically to deny that their belief system had a religious caste.[12]

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9. 374 U.S. 203 (1963).

10. Arlin M. Adams, *Henry Sawyer: Advocate for the Unpopular*, 148 U. PA. L. REV. 1, 5 (1999).

11. Malnak v. Yogi, 440 F. Supp. 1284, 1325 (D.N.J. 1977).

12. This footnote is to be known as The Sarah Barringer Gordon/Frank I. Goodman Footnote. The genesis of the footnote is as follows: During the pleasant reception that took place after the presentation of the Adams Lecture, Professor Goodman advised me, in Professor Gordon's presence, that Professor Gordon had volunteered to Professor Goodman that I was somewhat off the track in suggesting that *Malnak* was the first case of its kind, she being of the view that in two earlier draft-exemption cases the Supreme Court had addressed very similar issues. Professor Gordon then told Professor Goodman, in my presence, that it was not entirely kind of him to have related to the lecturer the *dubitante* she had privately voiced to Professor Goodman; but she did not withdraw the *dubitante* (nor should she have; scholarship is a stern mistress). Given this modest sally of friendly fire from a leading constitutional law scholar, aided and abetted by another, prudence suggests that I offer something by way of defense. So here goes:

It is the case that, prior to *Malnak*, the Supreme Court, in *United States v. Seeger*, 380 U.S. 163 (1965), and *Welsh v. United States*, 398 U.S. 333 (1970), addressed issues that had some verbal similarity to the *Malnak* issues. But *Seeger* and *Welsh* (both of which were among the numerous Supreme Court cases canvassed by Judge Adams in his appellate concurring opinion in *Malnak*, discussed in the text of this Essay, *infra*), were, in my view, substantively quite unlike *Malnak*.

In *Seeger* and *Welsh* the questions presented centered on whether a person whose strong moral code forbade participation in war but who neither professed a belief in God, nor belonged to any group characterizing itself as religious, nor was ready flatly to describe his moral code as "religious," but was also not ready flatly to reject that description, qualified for exemption from the military draft under the Selective Service Act's conscientious objector provision, § 6(j), 50 U.S.C. app. § 456(j) (1958). Section 6(j) provided as follows:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

50 U.S.C. app. § 456(j).

In *Seeger*, the Court, in an opinion by Justice Clark, unanimously held:

> We have concluded that Congress, in using the expression "Supreme Being" rather than the designation "God," was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views. We believe that under this construction, the test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is "in a relation to a Supreme Being" and the other is not.

380 U.S. at 165-66.

In *Welsh*, the petitioner was somewhat less ready than those seeking conscientious objector status in *Seeger* to link his moral code to the adjective "religious." This time the Justices were sharply divided. The opinion for the eight-Justice Court (Justice Blackmun did not participate) was written by Justice Black and was joined by Justices Douglas, Brennan, and Marshall (the latter having succeeded Justice Clark). Wrote Justice Black:

> Most of the great religions of today and of the past have embodied the idea of a Supreme Being or a Supreme Reality—a God—who communicates to man in some way a consciousness of what is right and should be done, of what is wrong and therefore should be shunned. If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by . . . God" in traditionally religious persons. Because his beliefs function as a religion in his life, such an individual is as much entitled to a "religious" conscientious objector exemption under § 6(j) as is someone who derives his conscientious opposition to war from traditional religious convictions.

Welsh, 398 U.S. at 340. Justice Harlan, in a twenty-two-page opinion, concurred in the result:

> Today the prevailing opinion makes explicit its total elimination of the statutorily required content for a conscientious objector exemption. The prevailing opinion now says: "If an individual deeply and sincerely holds beliefs that are *purely ethical* or *moral* in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time" (emphasis added), he qualifies for a § 6(j) exemption.
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> In my opinion, the liberties taken with the statute both in *Seeger* and today's decision cannot be justified in the name of the familiar doctrine of construing federal statutes in a manner that will avoid possible constitutional infirmities in them. There are limits to the permissible application of that doctrine, and, as I will undertake to show in this opinion, those limits were crossed in *Seeger*, and even more apparently have been exceeded in the present case. I therefore find myself unable to escape facing the constitutional issue that this case squarely presents: whether § 6(j) in limiting this draft exemption to those opposed to war in general because of theistic beliefs runs afoul of the religious clauses of the First Amendment. For reasons later appearing I believe it does, and on that basis I concur in the judgment reversing this conviction, and adopt the test announced by MR. JUSTICE BLACK, not as a matter of statutory construction, but as the touchstone for salvaging a congressional policy of long standing that would otherwise have to be nullified.

The district court's forty-page opinion in *Malnak* examined in painstaking detail the course textbook and the mode of teaching. The district court described a significant aspect of the course—the student's receipt of a "mantra"—a "sound aid," personal to that student, on which the student was to concentrate in the meditation process. The mantra was imparted to the student by the teacher at a "puja"—a ceremony, taking place on a Sunday, and not on school premises, of an hour or two in length in which the teacher, reciting a Sanskrit chant, would invoke a revered SCI/TM personage who had died nearly a quarter of a century earlier. That invocation, the district court stated, was a "prayer," and hence an activity of a "religious nature." SCI/TM, the district court ruled, was a religion.

On appeal, the Third Circuit affirmed, in a three-page per curiam opinion, "essentially for the reasons set forth" by the district court.[13] Except for describing the puja, the per curiam said almost nothing about the district court's exhaustive findings. Thus, the per curiam shed no light—and hence provided no guidance to the district courts of the Third Circuit—on a constitutional question of first impression that was clearly of substantial importance: what does the word "religion" as used in the Constitution mean? Judge Adams, who did not join the per curiam, filed a fifteen-page concurrence that addressed the constitutional question his panel colleagues finessed.

What Judge Adams did was to examine, and search for the common denominators of, the principal Supreme Court cases dealing with religion. From this examination Judge Adams concluded that religion does not necessarily connote belief in a divinity, since many systems of manifestly religious belief, from Buddhism to Taoism to Ethical Culture, are nontheistic. Judge Adams then went on to develop three "indicia" of religion:

> The first and most important of these indicia is the nature of the ideas in question. . . .
>
> . . . .
>
> . . . One's views, be they orthodox or novel, on the deeper and more imponderable questions—the meaning of life and death, man's role in

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Id. at 345 (Harlan, J., concurring). Justice White, joined by Chief Justice Berger and Justice Stewart, dissented.

One important difference between *Malnak*, on the one hand, and *Seeger* and *Welsh*, on the other, is that the latter involve the construction of statutory words—"religious" and "Supreme Being"—not the constitutional word "religion." It is evident, however, that *Seeger* and *Welsh* were both decided under a weighty overlay of constitutional concerns. Justice Harlan's elegant—and eloquent—concurring opinion makes this abundantly clear.

As to the verbal similarity between *Malnak* and *Seeger/Welsh*: In *Malnak* the Third Circuit attributed religious status to persons who disclaimed the attribution. In *Seeger/Welsh* the Supreme Court attributed quasi-religious status to persons who, while welcoming the attribution insofar as it tended to legitimate their conscientious objector claims, were philosophically scrupulous enough to refrain from unreservedly embracing the attribution's verbal aptness. As to the litigation dissimilarity between *Malnak* and *Seeger/Welsh:* In *Malnak* the court imposed the unwanted attribution on persons who, in consequence, lost the resultant litigation. In *Seeger* and *Welsh* the attribution, hesitantly contended for, spelled victory in the resultant litigation. See *infra* note 17.

13. Malnak v. Yogi, 592 F.2d 197, 198 (3d Cir. 1979) (per curiam).

> the Universe, the proper moral code of right and wrong—are likely to be the most . . . important to the believer. They are his ultimate concerns. As such, they are to be carefully guarded from governmental interference, and never converted into official government doctrine.
>
> . . . Certain isolated answers to "ultimate" questions, however, are not necessarily "religious" answers, because they lack the element of comprehensiveness, the second of the three indicia. . . . Thus the so-called "Big Bang" theory, an astronomical interpretation of the creation of the universe, may be said to answer an "ultimate" question, but it is not, by itself, a "religious" idea.[14]

The third of the three indicia of religion identified by Judge Adams was whether the belief system was accompanied by an institutional apparatus such as "formal services, ceremonial functions, the existence of clergy . . . efforts at propagation [etc.]"[15] But Judge Adams was quick to add that "a religion may exist without any of these signs."[16]

Having staked out his understanding of "religion," Judge Adams went on to measure the New Jersey course against his three indicia and concluded that SCI/TM was a "religion" within the meaning of the Constitution.[17] I think we can recognize a direct line from Judge Adams's analysis in *Malnak*, in 1979, to the ruling of Judge John E. Jones, III, less than two years ago, that Intelligent Design is a "religion," and hence could not constitutionally be presented as "science" in the Dover public schools.[18]

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14. *Id.* at 208-09 (Adams, J., concurring).

15. *Id.* at 209.

16. *Id.* To complete his analysis, Judge Adams went on to reject a construction of the First Amendment's religious clauses that had at the time acquired some currency in the academy—namely, that "religion" for the purposes of the Free Exercise Clause, which protects individuals from governmental intrusion on an individual's freedom of worship, should be regarded as broader in scope than "religion" for the purposes of the Establishment Clause, which is a constraint on governmental programs whose benign or directive ingredients are in some measure faith based. Judge Adams planted himself firmly—and, I think, properly so—on Justice Rutledge's cautionary language in his celebrated dissent in *Everson v. Board of Education*, 330 U.S. 1, 32 (1947): "'Religion' appears only once in the amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid 'an establishment' and another, much broader, for securing 'the free exercise thereof.'"

Judge Adams was careful to point out that "[a]lthough the [*Everson*] Court split over the comprehensiveness of the establishment clause, Rutledge's views on the unitary definition of religion were not disputed by the majority." *Malnak*, 592 F.2d at 211 n.51 (Adams, J., concurring).

17. As noted above, one aspect of *Malnak* that underscored the challenging and sensitive nature of the issues was the fact that the entity judicially determined to be a "religion" did not regard itself as a religion. Judge Adams met this head-on:

> Appellants have urged that they do not consider SCI/TM to be a religion. But the question of the definition of religion for first amendment purposes is one for the courts, and is not controlled by the subjective perception of believers. Supporters of new belief systems may not "choose" to be non-religious, particularly in the establishment clause context.

Malnak, 592 F.2d at 210 n.45.

18. Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707, 718 (M.D. Pa. 2005). See also *supra* note 8.

Judge Adams's 1979 opinion in *Malnak* was masterly, as was Judge Maris's opinion in *Gobitis*, forty-two years before. One is left to wonder why Judge Adams's panel colleagues preferred their colorless per curiam to Judge Adams's trenchant and fruitful analysis—an analysis that not only produced a sensible solution to the case before the court but would offer a framework for the disposition, or avoidance, of controversies in the future. So too, one wonders why, in *Gobitis*, Judge Clark's panel colleagues signed on to his useless opinion. From time to time, looking upward on Mt. Olympus to the misty heights where appellate judges dwell, I ask myself questions of this sort about the actions or omissions of the deities to whom those in my line of work are required to look for guidance. But I do not pursue such questions for long. I recall the wisdom of the great *philosophe*, Emile de Becque, as interpreted by Ezio Pinza in the celebrated musical South Pacific:

I have done some modest editing of this Essay subsequent to presenting it, on February 5, 2007, as the Adams Lecture. The alterations of the text have been minor. A few footnotes have been enhanced, and a few have been added. When I presented the lecture, this footnote merely consisted of the above citation of *Kitzmiller*. But a news story appearing on page A16 of the *New York Times* on February 17, 2007—twelve days after the lecture—seems to require inclusion. The news story reports what can only be characterized as a bizarre episode in which a Texas state legislator circulated to his colleagues a memorandum of a Georgia state legislator arguing that "'tax supported evolution science' was based on religion and therefore unlawful under the United States Constitution." The opening paragraphs of the *Times* story—quoting from the Georgia legislator's memorandum and also from the embarrassed Texas legislator's subsequent apology for his remarkable gaffe—are as follows:

> February 17, 2007
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> *Lawmaker Apologizes for Memo Linking Evolution and Jewish Texts*
>
> By Ralph Blumenthal
>
> HOUSTON, Feb. 16 – A leader of the Texas House of Representatives apologized Friday for circulating an appeal to ban the teaching of evolution as derived from "Rabbinic writings" and other Jewish texts.
>
> "I had no intention to offend anyone," said the lawmaker, Warren Chisum, a Republican from the Panhandle who is chairman of the House Appropriations Committee.
>
> Mr. Chisum said he had received the information from Ben Bridges, a Georgia legislator, and "I never took it very seriously."
>
> On Feb. 9, Mr. Chisum, 68, an 18-year veteran of the House and second in power only to the speaker, Tom Craddick, sent a memorandum to all 149 other state representatives in Texas.
>
> The one-page memorandum, marked "From: Representative Ben Bridges," declared that "tax-supported evolution science" was based on religion and therefore unlawful under the United States Constitution.
>
> It continued, "Indisputable evidence—long hidden but now available to everyone—demonstrates conclusively that so-called secular evolution science is the Big Bang 15-billion-year alternate 'creation scenario' of the Pharisee Religion."
>
> "This scenario," the memorandum stated, "is derived concept-for-concept from Rabbinic writings on the mystic 'holy book' kabbala dating back at least two millennia."
>
> The memorandum said that the inquiries could be directed to the Fair Education Foundation, a group in Georgia, and gave its Web address, fixedearth.com. The site features items belittling the Holocaust and portraying Earth as stationary as depicted in the Bible, with Jewish thinkers like "Kabbalist physicist Albert Einstein" responsible for contrary scientific theories.

Who can explain it?

Who can tell you why?

Fools give you reasons.

Wise men never try.

Judge Clark's *Gobitis* opinion and the *Malnak* per curiam show that judges—even judges comforted by life tenure—are capable of doing an inadequate job. It is, however, my submission that, for the most part, judges whose institutional independence is respected do a creditable job. I cannot prove this empirically. It is a supposition. But it is an important supposition. It gives purpose to the teaching and scholarship that flourish in this law school. On it depend the integrity and coherence of our legal order.

My concern—and to this I now turn—is that judges interfered with, or impeded, in one way or another, by external interventions of the coequal political branches, Congress and the President, are likely to find it a good deal harder to "administer justice."

II.

Some interventions misfire. I have in mind, for example, the ill-starred effort of John Adams—in the closing days of his administration, with the White House and Congress about to be controlled by Jefferson and his Republicans—to establish a new circuit court, filled by sixteen "midnight judges," almost all of whom, by some curious coincidence, appear to have been members of Adams's Federalist Party.[19] And I also have in mind the equally ill-starred riposte of Jefferson and his Republican Congress—abolition of the new circuit court, ending the sixteen life-tenure judgeships after less than two years.[20] And I further have in mind the effort of Jefferson and his allies in the House of Representatives to impeach Justice Samuel Chase, the Supreme Court's most vociferous Federalist, an impeachment that appeared to be the intended forerunner of a similar attack on Marshall and the other justices—a challenge to the independence of the judiciary that was blunted by the Senate's acquittal of Justice Chase.[21]

And I have in mind Franklin Roosevelt's 1937 attempt to add six justices to the nine justices of the Supreme Court, so that, with a fifteen-justice Court, the five justices who had invalidated key New Deal laws could be easily outvoted.

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19. The creation of the new circuit court "combined thoughtful concern for the federal judiciary with selfish concern for the Federalist party." FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 25 (1928). *See generally* Kathryn Turner, *The Midnight Judges*, 109 U. PA. L. REV. 494 (1961) (providing historical details about Adams's last-minute appointees).

20. *See* Stuart v. Laird, 5 U.S. (1 Cranch) 299, 299, 307 (1803); 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 269-73 (1922); Louis H. Pollak, *What Did John Marshall Decide and Why?*, 148 PROC. AM. PHIL. SOC'Y 1, 12 (2004).

21. "The profound effect produced upon the course of American legal history by the failure of the Chase impeachment can hardly be overestimated; for it is an undoubted fact that, had the effort been successful, it was the intention of the Republicans to institute impeachment proceedings against all the Judges of the Court." WARREN, *supra* note 20, at 292-93.

That dismal court-packing plan—announced by FDR on February 5, 1937, just seventy years ago today—died in a Senate committee, as it deserved to, five months later.[22]

The Chase impeachment and the court-packing plan were bad initiatives by great Presidents. The initiatives deserved to fail and their authors deserved to lose face. At the same time, it would be a mistake to suppose that the critiques of the Court's performance by those two great Presidents were without impact on the long-term thinking of the Justices and, indeed, of lower court judges as well. Courts should take informed criticism into account.[23] What is unacceptable, however, is external skewing of the judicial process that affects the decision of particular cases. Neither Jefferson nor Roosevelt accomplished this, or tried to.

But in the two worst cases in the history of the Court—*Korematsu v. United States*[24] and *Dred Scott v. Sandford*[25]—such skewing did take place, and with malign impact. In *Korematsu* it was government counsel misleading the courts. In *Dred Scott* it was direct, private, communication to two Supreme Court Justices from on high.

In *Korematsu*, the Court, by a vote of six to three, affirmed the misdemeanor conviction of Fred Korematsu, a resident of California, for failing to report to an assembly point from which he was to be shipped to an internment camp in Utah. The effect of the decision, handed down in late 1944, ten months before the end of World War II, was to sustain the wartime detention of 112,000 persons of Japanese ancestry, the great majority of whom were American citizens. In arguing the need for the detention program, the government submitted to the courts, including the Supreme Court, a report by the West Coast military commander, General John L. DeWitt, warning that persons of

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22. FDR's court-packing proposal was followed within less than eight weeks by a Supreme Court decision, *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), sustaining, by a vote of five to four, a minimum-wage-for-women statute that seemed indistinguishable from a statute held invalid, five to four, the year before, in *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936). This led to the attribution to Justice Owen Roberts, who cast the crucial fifth vote in each case, of "the switch in time that saved nine." Clever as the line is, the intimation that Justice Roberts changed his views, or at least his vote, as a concessive response to the President's February 5, 1937 initiative does not seem warranted. Justice Frankfurter, in his memorial tribute to his colleague, set forth a memorandum prepared by Justice Roberts detailing the chronology of *Parrish*. In conference on December 19, 1936, Justice Roberts voted to affirm *Parrish*, notwithstanding *Tipaldo*—the difference being that in *Tipaldo* counsel defending the statute declined to ask the Court to reconsider the foundation case, *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), that invalidated a District of Columbia minimum-wage-for-women statute; when, in *Parrish*, counsel were prepared to seek the overruling of *Adkins*, Roberts was prepared to reconsider and jettison it. Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311, 313-17 (1955). *But see* KENNETH S. DAVIS, FDR: INTO THE STORM: A HISTORY, 1937-1940, at 96-99 (1993).

23. *See* William H. Hastie, *Judicial Role and Judicial Image*, 121 U. PA. L. REV. 947, 951 (1973) (characterizing nonpartisan criticism of judicial decisions as "an invaluable corrective of otherwise unrealized error"); Louis H. Pollak, *Criticizing Judges*, 79 JUDICATURE 299, 299 (1996) (distinguishing between "principled criticism of judicial decisions" and partisan attacks that threaten independence of the judiciary).

24. 323 U.S. 214 (1944).

25. 60 U.S. (19 How.) 393 (1857).

Japanese ancestry living in the coastal states were likely to engage in sabotage or otherwise assist the enemy. Not until decades after World War II was it disclosed that the Department of Justice did not advise the courts that the information known to other government agencies, including the FBI, contradicted the assessment by General DeWitt—who was, it may be added, a racist. Forty years after the Supreme Court upheld Fred Korematsu's conviction, his conviction was set aside.[26]

Korematsu, approving as constitutional the wartime detention of more than one hundred thousand people who had done nothing wrong, was a tragedy of huge proportions. *Dred Scott* was worse. The Court, in the opinion of Chief Justice Roger Brooke Taney, ruled that no black slave, and no free black descended from slaves, could be a citizen of the United States. And the Court further ruled that the Missouri Compromise of 1820, barring slavery in the federal territories north of latitude 36°30', was unconstitutional, because Congress had no power to prohibit slavery in the territories. This latter ruling so compromised the capacity of the political branches to deal with slavery as to invite secession and the ensuing Civil War four years later.[27] Two Justices—Justices McLean and Curtis—dissented.

In *Dred Scott*—which was argued in December of 1855 and then reargued in December of 1856—Dred and Harriet Scott were appealing a Missouri federal court decision that denied they had gained their freedom when held as slaves by a Missouri Army doctor, John Emerson, at the military post of Fort Snelling in the free Territory of Upper Louisiana, north of the Missouri Compromise line, and prior to that, as to Dred Scott, held by Emerson as a slave at the military post of Rock Island in the free state of Illinois. There was very little chance that the Scotts would win in the Supreme Court. Only six years before, the Supreme Court, in *Strader v. Graham*,[28] had ruled unanimously that whether a slave taken by his or her master into a free state, and then brought back to the slave state by the master, was rendered free by the free-state interval, was a legal issue to be determined by the courts of the slave state. It was improbable that the Court would take a different view when the slave's temporary freedom venue was a territory rather than a state. And, in litigation preceding the Scotts' federal lawsuit, the Missouri Supreme Court, in a case captioned *Scott v. Emerson*,[29] had

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26. Korematsu v. United States, 584 F. Supp 1406, 1419 (N.D. Cal. 1984).

27. *See* ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 36 (1941).

The *Dred Scott* decision was a significant departure and an ominous portent. It is true that in a formal sense it had no immediate effect. The Missouri Compromise, which it declared to have been invalid, had already been repealed. But the decision was a deliberate attempt to destroy or neutralize Congressional power to deal with the single most important issue of the moment. This was a challenge, indeed, to popular and, probably more, to federal government. It took a Civil War to answer the challenge.

28. 51 U.S. (10 How.) 82 (1850).

29. 15 Mo. 576 (1852).

In a series of cases in the 1830s the Missouri Supreme Court had ruled in favor of the freedom plea in situations apparently analogous to that of Dred and Harriet Scott. Essentially indistinguishable on the facts was *Rachael v. Walker*, 4 Mo. 350 (1836), ruling in favor of Rachael, "a Woman of Color,"

decided against the Scotts' freedom plea. So, after the Scotts' appeal from the adverse decision of the Missouri federal trial court had been argued and then reargued in the Supreme Court, it appeared likely that the big issue with which the Justices would wrestle in postargument conference would be choosing the path the Court's opinion would pursue in deciding against the Scotts. Would the Scotts lose on the basis of the Missouri state court decision,[30] or would they lose

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held as a slave by an army officer stationed first at Fort Snelling and next at Fort Crawford, a military post at Prairie du Chien, located in Michigan Territory and hence governed by the slavery prohibition in the Northwest Ordinance of 1787. Justice Scott, in his opinion for the court in *Scott v. Emerson*, overruled *Rachael v. Walker* and several kindred decisions. Justice Scott explained:

> Times now are not as they were when the former decisions on this subject were made. Since then not only individuals, but States, have been possessed with a dark and fell spirit in relation to slavery, whose gratification is sought in the pursuit of measures, whose inevitable consequences must be the overthrow and destruction of our government. Under such circumstances it does not behoove the State of Missouri to show the least countenance to any measure which might gratify this spirit. She is willing to assume her full responsibility for the existence of slavery within her limits, nor does she seek to share or divide it with others. Although we may, for our own sakes, regret that the avarice and hard-heartedness of the progenitors of those who are now so sensitive on the subject, ever introduced the institution among us, yet we will not go to them to learn law, morality or religion on the subject.

Scott, 15 Mo. at 586-87.

Justice Gamble—who, as a practicing lawyer, had represented the slave owner in *Rachael v. Walker*—dissented:

> The cases here referred to are cases decided when the public mind was tranquil, and when the tribunals maintained in their decisions the principles which had always received the approbation of an enlightened public opinion. Times may have changed, public feeling may have changed, but principles have not and do not change; and, in my judgment, there can be no safe basis for judicial decisions, but in those principles, which are immutable.

Id. at 591-92 (Gamble, J., dissenting).

30. Mention should be made of a possible ground some of the Justices might have had for not extending deference to the Missouri Supreme Court's decision in *Scott v. Emerson*: In the initial argument before the United States Supreme Court in December of 1855, and in the reargument in December of 1856, counsel for Dred and Harriet Scott, appear to have contended, inter alia, that the Missouri Supreme Court's decision adverse to the Scotts was a deviation from the settled Missouri cases and hence not deserving of the conclusive authority with respect to the state law of slavery laid down in *Strader v. Graham*. See *supra* text accompanying note 28. But Justice Nelson, in a concurring opinion in *Dred Scott* (an opinion which, from its mode of composition, seems to have been expected by the draftsman to be the opinion of the Court), disagreed. As Justice Nelson read *Scott v. Emerson* and subsequent Missouri cases:

> The same question has been twice before that court since, and the same judgment given (15 Misso. R., 595 [*Calvert v. Steamboat Timoleon*]; 17 Ib., 434 [*Sylvia v. Kirby*]). It must be admitted, therefore, as the settled law of the State, and, according to the decision in the case of Strader, et al. v. Graham, is conclusive of the case in this court.

60 U.S. (19 How.) at 465-66 (Nelson, J., concurring). Justice Nelson was correct that the two subsequent Missouri Supreme Court opinions that he cited in the passage quoted above—*Calvert v. Steamboat Timoleon* and *Sylvia v. Kirby*—relied on *Scott v. Emerson*.

What basis is there, then, for the suggestion that at some point in the Court's consideration of *Dred Scott* there may have been some question in the minds of one or more of the Justices as to whether *Scott v. Emerson* should be treated as an authoritative statement of Missouri law? The basis for such conjecture is flimsy, to be sure, and builds, in large part, on unverifiable hearsay. A century and a half later it seems unlikely that the conjecture can ever be confidently confirmed or confidently

on the ground—strongly urged by leading Southern politicians—that the Scotts' reliance on the free status of the Minnesota Territory was misplaced because the

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dismissed. With this unpromising pedigree, I include in this footnote an extended recital by Benjamin R. Curtis, Justice Curtis's son, excerpted from pages 209-11 of volume 1 of the son's *Memoir of Benjamin Robbins Curtis, LLD.*, published in 1879. In the course of an extended discussion of *Dred Scott*, in which his father wrote a memorable dissent, the son reports as follows:

> Among the curious incidents connected with the case of Dred Scott there is one which has never heretofore been publicly noticed, and which strongly illustrates the vacillation of some of the judges in regard to its final disposal. At the same term at which Scott's case was first argued, (December term, 1855,) a case was argued and decided, which stands reported in the eighteenth volume of Howard's Reports under the name of *Pease v. Peck*. It involved the effect that should be given by the Supreme Court of the United States to the decisions of a State court upon a question of the State law. It was assigned to Judge Grier to write the opinion of the court. The decision was adverse to that of the State court on the question of State law; and the case in the Supreme Court of the United States was not on a writ of error to the State court, but it was, as in Scott's case, on a writ of error to a Circuit Court of the United States. Knowing from the first argument of Scott's case that the effect of the last decision of the Supreme Court of Missouri would be involved in the consideration of the merits, — because the Supreme Court of Missouri had held Scott to be a slave, on his return into that State, notwithstanding his residence, with his master, in a free State and a free Territory, — Judge Grier, representing a majority of the court, laid down, in his opinion in the case of *Pease v. Peck*, a very broad rule in regard to the binding force of State decisions, in the Supreme Court of the United States, on questions of State law. The rule thus propounded was stated to be, that in all cases where there is a settled construction of the laws of a State, by its highest judicature, it is the practice of the courts of the United States to receive and adopt it without criticism or further inquiry; but that when the decisions of the State court are not consistent, the judges of the Supreme Court of the United States do not feel bound to follow the last, if it is contrary to their own convictions.[1] This was deliberately and purposely laid down as the rule, not only to justify the intended decision in *Pease v. Peck*, but also in order to make a precedent under which the judges, when Scott's case should be finally acted upon, might be free to disregard the last decision of the Supreme Court of Missouri, and to give Scott the benefit of their own convictions upon the question of his *status*, after his return to that State, if they should differ from the State court.[2] Unfortunately, when Scott's case came to be finally acted upon, the opinion of the Chief Justice made no allusion to what had been said in the case of *Pease v. Peck*, but it attributed to the last decision of the State court the most stringent effect that was ever given to a State decision, and that, too, on a question of personal freedom. But the great question on this part of the case was, whether the *status* of Scott was a mere matter of the local law of Missouri, or whether it was a question of universal jurisprudence, on which the Supreme Court of the United States was not bound by the decisions of the State court. The Chief Justice treated it as a mere question of local law. Judge Curtis treated it as a question of international law, whose rules required the *status* of Scott, as fixed by the laws of the Territory of Wisconsin, to be recognized in Missouri by the Federal court sitting in that State.
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> 1. See the opinion in *Pease v. Peck*, 18 Howard's Rep. 595, 598.
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> 2. I make this statement on the authority of a gentleman still living, — Mr. Edward N. Dickerson, of New York, — an intimate friend of Judge Grier, who was so informed by Judge Grier himself, at the time when *Pease v. Peck* was decided.

The foregoing recital by Justice Curtis's son—published in 1879, five years after Justice Curtis's death, nine years after Justice Grier's death, and more than twenty years after *Dred Scott* was decided—was referred to, and hence given revived currency, in CARL B. SWISHER, THE TANEY PERIOD, 1863-64, at 611 (The Oliver Wendell Holmes Devise, History of the Supreme Court of the United States, Vol. 5, 1974).

Missouri Compromise was an unconstitutional interference with the property rights of slave owners? To decide against the Scotts on such a momentous constitutional ground, when settled doctrine of narrow scope would dictate the same result, would contravene proper judicial practice of not reaching out for larger constitutional issues that need not be addressed. But there were five Justices—the five Southern Justices—who had some inclination to reach the Missouri Compromise question. Their inclination was, however, tempered by some uncertainty about the institutional wisdom of deploying their majority weight in this way unless at least one of the four Northern Justices would join them.

So matters stood in February of 1857. On February 5—one hundred and fifty years ago today—Montgomery Blair, lead counsel for the Scotts, advised former President Martin Van Buren that he thought the Court was being subjected to external pressure to rule that the Missouri Compromise was unconstitutional.[31] Blair was right. Two days before, a Pennsylvania lawyer, a lawyer from Lancaster, had written to his good friend, Supreme Court Justice John Catron, of Tennessee, to inquire whether the case—which had become the focus of national political debate—would be decided before March 4. Why did the Lancaster lawyer want to know? Because he was James Buchanan, and on March 4 he was to be sworn in as President of the United States, and he was planning his inaugural address.

In the authoritative study of *Dred Scott*, Don Fehrenbacher reports that:

> Catron replied [to Buchanan] that the Court as yet had taken no action on the case, but he thought that Buchanan was entitled to the information and he would try to obtain it. The implications of this exchange were plain enough. Only a decision on the constitutionality of the Missouri Compromise restriction could be of any importance to Buchanan in preparing his inaugural.[32]

A few days later, Catron wrote Buchanan that the Court's opinion would probably not address the Missouri Compromise question. But on February 19 Catron wrote again. The question probably would be addressed. But there was the problem of having so crucial an issue resolved by only the five Southern Justices. So Catron, as we learn from Fehrenbacher, "in his letter of February 19 and again four days later, urged Buchanan to help bring his fellow Pennsylvanian [Supreme Court Justice Robert Grier] into line."[33]

Buchanan wrote Grier at once, and the letter evoked a sympathetic response. "I am anxious," replied Grier to the President-elect, "that it should not appear that the line of latitude should mark the division in the court. . . . On conversation with the chief justice, I have agreed to *concur with him.*"[34] Chief

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31. DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 668-69 n.5 (1978).

32. *Id.* at 307.

33. *Id.* at 311.

34. *Id.* at 312 (footnote omitted).

Justice Taney announced the decision, and read his opinion, on March 6, two days after swearing in James Buchanan as President.

In the following year, 1858, Taney's opinion in *Dred Scott* was the principal fuel of the celebrated debates between Stephen Douglas, the incumbent Illinois Senator seeking reelection, and Abraham Lincoln, hoping to unseat Douglas. In the debates, Lincoln challenged Taney's opinion. Douglas contended that America could live with it. Douglas was reelected to the Senate, defeating Lincoln. Two years later, as Buchanan's dismal presidency wound to a close, Lincoln defeated Douglas for the presidency.

III.

A.

As *Korematsu* reflects, in World War II the executive and legislative branches looked to the courts, through enforcement of federal criminal laws, to bring about compliance with the massive detention program asserted to be required for the protection of the nation's security. The irreparable institutional flaw in this enforcement system was that the lawyers of the executive branch treated the courts with studied disingenuity—not telling the courts the whole truth.

In the current war—the war against terrorism—the executive branch has undertaken to run its detention program on a different basis. The courts have been told to butt out—that they have no proper role to play. This tactic has not been uniformly successful. In *Hamdi v. Rumsfeld*,[35] the detainee, Yaser Hamdi, an American citizen taken into military custody in Afghanistan, sought release via habeas corpus, claiming that he was not, as the Defense Department characterized him, an "enemy combatant." The government's lawyers, as counsel for Secretary of Defense Donald Rumsfeld, initially took the position that the federal district court had no authority whatsoever to review the executive determination that Hamdi was an enemy combatant. By the time Hamdi's case reached the Supreme Court, the government's position had slightly—very slightly—softened. The softened position was that, once government counsel had filed with the district court a Defense Department official's sworn declaration reciting the grounds for regarding Hamdi as an enemy combatant, the court was obligated to defer to that declaration and dismiss the habeas corpus petition. Justice O'Connor, writing for a four-Justice plurality of the Supreme Court, was not persuaded. "[A] habeas court in a case such as this may accept [official] affidavit evidence . . . , so long as it also permits the alleged combatant to present his own factual case to rebut the Government's return."[36] Justice O'Connor observed that "[w]e have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[37]

35. 542 U.S. 507 (2004).

36. *Id.* at 538.

37. *Id.* at 536.

When it comes to the rights of noncitizens whom the executive branch designates as enemy combatants—those detained at Guantanamo, some of whom are scheduled to be tried by military commissions—the President may have greater authority. The Supreme Court's decision last June, in *Hamdan v. Rumsfeld*,[38] invalidating the Guantanamo military commissions as then constituted, appears to have been limited in significant respects by legislation enacted last fall, at the President's behest, establishing a somewhat modified system of military commissions and undertaking radically to circumscribe the scope of judicial review of such commissions' decisions.[39] Thus, the law is in flux.

The executive branch's somewhat myopic view of the scope of habeas corpus apparently derives, at least in some measure, from the fact that the Constitution contemplates that the Great Writ may be suspended in situations of dire emergency—it being understood that suspension requires action by Congress, not by the President alone. The Suspension Clause—"The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it"[40]—was clearly very much in the minds of Attorney General Alberto Gonzales and Senator Arlen Specter in a recent colloquy:

> Gonzales: The fact that the Constitution – again, there is no expressed grant of habeas in the Constitution. There's a prohibition against taking it away.
>
> But it's never been the case. I'm not aware of a Supreme . . .
>
> Specter: Wait a minute. Wait a minute. The Constitution says you can't take it away except in case of rebellion or invasion. Doesn't that mean you have the right of habeas corpus unless there's an invasion or rebellion?

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38. 126 S. Ct. 1749 (2006).

39. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

On February 20, 2007, the Court of Appeals for the District of Columbia Circuit, in *Lakhdar Boumediene v. George W. Bush*, 476 F.3d 981 (D.C. Cir. 2007), sustained the constitutionality of the 2006 legislation's excision of the district court habeas corpus jurisdiction that had been sustained by the Supreme Court in *Hamdi* and *Hamdan*. Stephen Labaton, *Court Endorses Curbs on Appeal by U.S. Detainees*, N.Y. TIMES, Feb. 21, 2007, at A1. The court's opinion, written by Judge A. Raymond Randolph and joined by Judge David B. Sentelle, ruled that the Constitution "does not confer rights on aliens without property or presence within the United States." *Boumediene*, 473 F.3d at 991. Judge Judith W. Rogers dissented, stating that: "Prior to the enactment of the Military Commissions Act, the Supreme Court acknowledged that the detainees held at Guantanamo had a statutory right to habeas corpus. The M.C.A. purports to withdraw that right but does so in a manner that offends the constitutional constraint on suspension." *Boumediene*, 476 F.3d at 995 (Rogers, J., dissenting).

It is expected that the D.C. Circuit's decision in *Boumediene* will be reviewed by the Supreme Court, on certiorari, in the Court's 2007-2008 judicial term. Also, the *Times* story on *Boumediene* reports that, several days prior to the decision, Senator Patrick J. Leahy, Chairman of the Senate Judiciary Committee, and other Democratic senators introduced a bill that would modify the 2006 legislation by restoring access to habeas corpus for those in custody in Guantanamo. The proposed legislation has received the support of Senator Arlen Specter, the ranking Republican member of the Judiciary Committee. Labaton, *supra*.

40. U.S. CONST. art. I, § 9, cl. 2.

> Gonzales: I meant by that comment, the Constitution doesn't say every individual in the United States or every citizen is hereby granted or assured the right to habeas. Doesn't say that. It simply says the right of habeas corpus shall not be suspended except . . .
>
> Specter: You may be treading on your interdiction and violating common sense, Mr. Attorney General.[41]

It is apparent that the Senator has a rather more reverential view of the "privilege of the Writ" than does the Attorney General. As background for assessing the Specter-Gonzales exchange, it may be helpful to have in mind Justice Scalia's discussion—in his *Hamdi* dissent, in which Justice Stevens joined—of the extent to which the Framers of the Constitution drew on the evolution of habeas corpus in English law, noting the decisive influence of Blackstone, the great eighteenth-century legal scholar: "The two ideas central to Blackstone's understanding—due process as the right secured, and habeas corpus as the instrument by which due process could be insisted upon by a citizen illegally imprisoned—found expression in the Constitution's Due Process and Suspension Clauses."[42]

In managing another aspect of the current war—the interception of telephone conversations between persons in the United States and persons abroad—the executive branch has found it convenient to circumvent the courts entirely, and not to advise the courts, or Congress (apart from a few individual members), what it was doing. This was done notwithstanding the fact that in 1978, to prevent repetition of warrantless governmental intrusions attendant on the Vietnam War, Congress, in the Foreign Intelligence Surveillance Act, had required the executive branch to go to court—the so-called FISA Court—to get judicial approval of proposed interceptions of international telephone calls. Disclosure of this covert practice has, of course, prompted challenges in various federal courts. These challenges, the most advanced of which has now been argued in the Sixth Circuit, appear to have played some part in the Attorney General's recent announcement that the Department of Justice has resumed, at least for the time being, going to the FISA Court for permission to intercept. And the government's lawyers have, accordingly, now moved the Sixth Circuit to rule that the litigation before it is moot—a motion the court has, to date, not yet ruled on.

Those few lawyers in this room—Arlin Adams, Clifford Green, Stanley Brotman, Jerome Shestack and I, and perhaps one or two others—who are ancient enough to remember back to the Korean War, can see in the current FISA controversy a close parallel to President Truman's seizure of the steel mills in order to forestall a steel strike, which, the government feared, would create a shortage of steel vitally needed for the war effort. The steel companies went to court to get their mills back. The government relied on the President's enhanced

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41. *The Bill of Rights, and Sometimes Wrongs*, WASH. POST, Jan. 23, 2007, at A15. See also *supra* text accompanying notes 36 and 37.

42. Hamdi v. Rumsfeld, 542 U.S. 507, 555-56 (2004) (Scalia, J., dissenting). See also *supra* text accompanying note 40.

wartime authority as justification for the seizure. But the Court ruled that the existence of legislation, which established processes of governmental intervention, including taking possession of property in emergency situations—a process that the government had not pursued—precluded the government's abrupt seizure. And so the President's action was not sustained.[43]

B.

From what I have said in the last few minutes it may be apparent that certain of the legal positions championed by the current administration—such as the scope of habeas inquiry in detention cases, or the legitimacy of circumventing the FISA process—have not struck me as wholly persuasive. But I do want to make it clear that the government's legal positions, including those I am not persuaded by, have, so far as I have observed, been presented with professionalism by able lawyers loyal to their client. And the same is to be said, by and large, with respect to the lawyers in the private sector who, in a time of national stress, have, for little or no compensation, shouldered the burdens of representing litigants combating the government. The public interest requires good lawyering on both sides of large public issues. Without it, judges can be seriously handicapped in administering justice. I stress this because, as recently as last month, a senior official of the Defense Department, who had substantial responsibility for the detention process, and who is himself a lawyer, publicly deplored the representation of Guantanamo detainees by major law firms and went so far as to suggest that "[c]orporate C.E.O.'s . . . should ask firms to choose between lucrative retainers and representing terrorists."[44] Within a day or so, the official produced some mealy mouthed apology. But the fact that such an attitude was held, and publicly voiced, by a senior official, is very dispiriting.[45] Contrast this with the way in which, half a century ago, several of the ablest litigators in private practice in Philadelphia rallied to defend a group of alleged Communists charged under the Smith Act. As Arlin Adams noted in his tribute to Henry Sawyer, these lawyers "volunteered for service at the behest of the Chancellor of the Philadelphia Bar Association, who believed that even unpopular defendants were entitled to appropriate legal representation."[46]

IV.

Judges administer justice in cases small and large. It is what judges do, for good or ill, in the largest of the large cases—the cases of constitutional dimension—that we have been considering today. I close by recalling words written in 1973, by a judge who was a trustee of this university and also a revered

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43. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 586-88 (1952).

44. Neil A. Lewis, *Official Attacks Top Law Firms Over Detainees*, N.Y. TIMES, Jan. 13, 2007, at A1.

45. The official resigned on February 2, 2007. Associated Press, *Critic of Gitmo lawyers quits defense post*, CHI. TRIB., Feb. 3, 2007, at C5.

46. Adams, *supra* note 10, at 2.

colleague and friend of Arlin Adams. The judge was William Hastie. The words I will read can be found in a law review article.[47] They are also etched in glass in the William H. Hastie Library of the United States Court of Appeals for the Third Circuit:

> Functionally, the popular or the democratic branches, the executive and the legislative, may be viewed as providing government with drive, while the oligarchic courts provide braking power. This is true even though judicial restraint on governmental movement in one direction may perforce provide a powerful stimulus to movement in another. But primarily the courts do not serve to make our society run. Rather they serve to prevent it from running wild.

47. Hastie, *supra* note 23, at 950.