seconds." Only the Attorney General, of course, can bring criminal proceedings to enforce the act. To date he has not chosen to do so.

When Mr. Nixon accepted his party's nomination for the Presidency in 1968, he had said, "Let those who have the responsibility of enforcing our laws, and our judges who have the responsibility to interpret them, be dedicated to the great principles of civil rights."

Again, a comparison of his words and his actions serves only to deepen the despair of those who seek a restoration of faith and truth in American government.

PART V

THE JUDICIARY

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The Principle of Judicial Independence

AN AMERICAN, asked to describe his system of government, will ordinarily define democracy as a government where the people choose their own public officials through the electoral process.

The ballot-box decision is, indeed, a cornerstone of our system of government, providing as it does every two, four or six years the safety valve of public acceptance of those who govern. There is a second peaceful decision-making process, however, which is equally important to the protection of domestic tranquility and the rights and privileges of those who are governed. This is the judicial process, the tendering of issues for decision by judge and jury under statutory rules and prior-case interpretations or precedent which we call "the law."

We like to refer to our government as one "of laws rather than of men," recognizing the danger that the prejudices of men and the weaknesses of human nature may often cause us to do the unjust or unwise thing. The judicial process, over the centuries, has earned a common respect on the basis that judges were *not* subject to political influences. Indeed, for a court to maintain public respect its decisions clearly must be above political influence, calmly reached after careful review of the facts and law alone.

We have never been assured that the passions of the moment or the temporary majority opinion of our people and their elected representatives are necessarily correct. There have been times when the two politically controlled branches of the government, strongly backed by near-unanimous public opinion, have proposed or carried out policies and actions which later were recognized as totally unjust. Perhaps the best example in recent times was the massive internment of Japanese-American citizens in 1942. We did not remove the provision for concentration camps from our laws until 1971—a full thirty years later before we as a nation recognized the enormity of the injustice we had worked on our fellow citizens. The Alien and Sedition Acts of 1798, our historic maltreatment of American Indians and our discrimination against blacks—by law and by custom—are among those national examples where the public opinion of one generation has been strongly repudiated by the next.

We have a record of being an impatient people, ready to do battle, impatient with delay, vigorous in meeting challenge. We have a national history of revolution, civil war, domestic disturbances, and individual and mob violence. These are things we may not recognize in ourselves with pride or comfort, but they shape a past and create a potential for the future that we cannot deny. Thus there is good reason for our adherence to the concept of a government of laws rather than of men. The single occasion in our national history when we declined to accept the decision of either ballot box or court resulted in the Civil War, one of the bloodiest wars in history's long march, considering the number of troops on each side.

We have historically needed the calm decisions of the courts as a final arbiter of questions of law. As old-fashioned as it may sound, acceptance of a government of law requires *respect* for the law and acquiescence in the general

morality and justice of the law. Faith in the law is required of a government which operates by the consent of the governed. This, in turn, requires faith in the men who administer the law—particularly in their freedom from political pressures. Judges must have freedom and independence from political influence if we are to have faith in their decisions.

From this premise we have slowly evolved, over our national history, the principle of judicial independence. The basic concept of judicial independence arose out of the difficulties that the original colonies had with the royal governors and the King of England. The Declaration of Independence listed among the grievances against King George that he had "made Judges dependent on his Will alone, for the tenure of their office and the amount and payment of their salaries." To remedy this grievance, Article III, Section 1, of the Constitution was drafted to provide that the judges of both the Supreme Court and the inferior courts "shall hold their office during good Behavior, and shall, at stated times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

While the Constitution thus recognized the principle of judicial independence, political leaders have always been quick to attack the judiciary when members of the public or their elected representatives felt that the Supreme Court's decisions were political in nature or were affected by political philosophy. These attacks have occurred, in each instance, when the politically elected branches of government, the President, the Congress or the state governments, disagreed, on either philosophical or political grounds, with a court interpretation of the Constitution—a court decision which was thought to be political rather than judicial in nature.

The Supreme Court's power to interpret the Constitution, as against the other branches of government, was not precisely spelled out in the Constitution. In two early cases, however, *Marbury v. Madison* (1803) and *Little v. Barreme* (1807), the Supreme Court under Chief Justice John Marshall ruled that acts of both Congress and the executive branch could be held null and void, or "unconstitutional," by the court. Chief Justice Marshall, speaking for a unanimous court in *Marbury v. Madison,* said, "It is emphatically the province and duty of the Judicial Department to say what the law is."

Chief Justice Marshall, in affirming the Court's right to say "what the law is," was likewise asserting its power to override Congress. This was not only judicial independence but "judicial supremacy," claimed by a court of holdover Federalist judges at a time when the great anti-Federalist revolution of 1800 had swept Thomas Jefferson and his Republican states'-rights party into power, with a Republican Congress as well. The decision raised a predictable storm of political antagonism.

Response from Congress was immediate and forceful. As Representative Caesar Rodney of Delaware phrased it, "Judicial supremacy may be made to bow before the strong arm of legislative authority. We shall discover who is the master of the ship." Supreme Court Justice Samuel Chase, one of the Federalist judges and a signer of the Declaration of Independence, had made a vigorous political speech to a grand jury in Baltimore suggesting that the Republican philosophy of President Jefferson was likely to destroy peace, order and progress. In early 1804, at Jefferson's request, the House of Representatives initiated an investigation and ultimately the impeachment of Justice Chase. The constitutional requirement of a two-thirds majority in the Senate, however, resulted in acquittal on all eight counts,

although a majority of Senators voted against Chase on three of them.

In subsequent decisions under Chief Justice Marshall, the Supreme Court broadened its authority, establishing, in addition to its judicial power in enunciating constitutional law, the basis of federal supremacy over state laws. In the landmark case of *McCulloch v. Maryland* in 1819, Marshall wrote with respect to federal legislative power: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." This meant that the federal government had the power, at least, to enact any laws necessary to a legitimate federal end. Carried to its ultimate conclusion, it meant that the states'-rights concepts of Jefferson, exemplified by the Tenth Amendment to the Constitution, could ultimately be overridden by congressional action. The Tenth Amendment reads: "The Powers not delegated to the United States by the Constitution, not prohibited by it to the States, are reserved to the States respectively, or to the People."

Since the country was founded, states'-rights advocates have argued that the Tenth Amendment precludes federal involvement in matters like education which were not expressly enumerated in the powers granted to Congress. The opposing argument, that of Chief Justice Marshall in *McCulloch v. Maryland,* has always prevailed, however, and the federal government's powers have gradually been increased as interstate commerce has increased in amount and complexity.

As long as he lived, Thomas Jefferson continued to fear, and to express his fear, that the Supreme Court had become too powerful. In 1821 he said:

> . . . the germ of dissolution of our federal government is in the constitution of the federal judiciary, an irresponsible body, (for impeachment is scarcely a scarecrow) working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped from the States, and the government of all be consolidated into one.

Jefferson's prediction was fairly accurate. He might have rolled over in his grave in 1942, when the Supreme Court reached a decision in *Wickard v. Filburn* as to the ultimate power of the federal government in regulating not only interstate commerce but all matters *affecting* interstate commerce. In the case of a local farmer growing twenty-three acres of wheat on his own farm to feed his own livestock, the court upheld a federal law prohibiting the raising of the wheat on the basis that the farmer would thus not have to buy wheat passing in interstate commerce, thus ostensibly lowering the demand, and the cost, of such wheat.

The states'-rights advocates may object to this extension of the power to regulate interstate commerce, but they forget that it was precisely the failure of the Congress to be able to regulate interstate commerce under the original Articles of Confederation which led to the scheduling of the Constitutional Convention. The power to regulate interstate commerce, and all matters affecting such commerce, is clearly accepted as constitutional today, and the scope of the Tenth Amendment has been effectively cut back since nearly every aspect of modern life can be said to either relate to or affect interstate commerce.

As our world has drawn closer together, the need for federal laws to regulate commerce has caused the Constitution to be more broadly construed. This flexibility of the

Constitution to be interpreted differently under changing circumstances may well be the greatest feature of our form of government.

In any event, returning to the evolution of judicial independence, the confrontation between President Jefferson and the Marshall Court was not the end of political concern over the judiciary. Although the Constitution protected Supreme Court judges against loss of their jobs or diminution of their salaries, there were other means of control and restraint; many of them have been tried over the years. Impeachment, increase or reduction in the number of judges, restriction of jurisdiction—all of these have been attempted or discussed in the critical periods of our history when the Supreme Court has come under criticism and hostility from either the executive or the legislative branch. Judicial independence has not been earned easily, and it remains fragile even to this day.

A second period of confrontation occurred during the stormy period of the Civil War and Reconstruction. By 1857 there was growing abolitionist sentiment. In that year the Supreme Court, in the Dred Scott case, held the Missouri Compromise unconstitutional—thereby refusing to set aside slavery in the Missouri territory, and also ruling that Congress was without constitutional powers to terminate slavery. One major newspaper commented that "the moral authority and consequent usefulness" of the Supreme Court was "seriously impaired if not destroyed." The court's decision led to increased tensions between North and South, and to the ultimate secession of the Southern states following the election of Abraham Lincoln in 1860. The question of a state's right to secede could be determined neither by court decision nor by ballot box. Civil war was the result.

During that war, difficulties arose between the court and President Lincoln over the suspension of the writ of habeas

corpus in areas where Lincoln felt the danger of insurrection would otherwise be enhanced. The Supreme Court having issued a writ to free an individual jailed by the military, one newspaper editor, Horace Greeley, went so far as to accuse the Chief Justice of having "taken sides with traitors." President Lincoln refused to enforce the writ.

In the aftermath of the war, with the country bitterly divided over Reconstruction policies, the Supreme Court found itself again at odds with the Congress. Representative Thaddeus Stevens, the radical Reconstructionist, at one time spoke of "murderers that are being turned loose" by a court decision, and Congress went so far as to enact a law depriving the Supreme Court of jurisdiction in cases under the Habeas Corpus Act of 1867.

As tensions eased in the 1870s, however, political attacks on the Supreme Court abated. For fifty years the Court operated relatively free of public or political antagonism. This era of freedom from controversy was shattered in 1937, when the relationship between the political world and the judiciary again came into sharp focus.

President Franklin D. Roosevelt had first been elected in 1932 in the midst of the economic crisis of the Great Depression. He had directed sweeping legislative changes to stimulate the economy, but the Supreme Court, holding to the conservatism of prior years, had struck down many of them as being unconstitutional extensions of federal power. Now, angered by the court's rejection of much of his "New Deal" legislation, and having achieved an overwhelming electoral victory in the 1936 election, Roosevelt proposed increasing the size of the court—"packing" the court, as it was called—from nine judges to fifteen, figuring he could influence future court decisions by the appointment of his own nominees.

The President did not properly appraise the American

public's resistance to interference with the principle of judicial independence, based on the long period of peace between political forces and the Supreme Court. My earliest recollection of political comment of any kind is that of my father, a second-generation California attorney, upon this proposal. I was nine years old when my father thundered something profane about "political interference with the judiciary, a despicable, arrogant and unconstitutional concept." It was the first time I had ever heard him use profanity, and although I didn't know what he was talking about at the time, the message remains clear and unequivocal. Years later, my father-in-law, a truly great Southern California lawyer, also used profanity for the first time in my presence when referring to President Roosevelt and his court-packing proposal of 1937.

The proposal died an early and painful death in the Congress, despite the support of a substantial majority of the President's own party. President Roosevelt's action may have had its desired effect, however. The Supreme Court, in a succession of decisions, gradually accepted the need for broadening federal powers over interstate commerce to deal with the economic problems of the 1930s.

The next period of political attack on the principle of judicial independence commenced in 1954, when the Supreme Court, in the first *Brown* case, held that state-segregated schools constituted a denial of equal protection of the laws to black children. Now, in 1971, as this is written, the attack on the courts is still continuing. This time the attack is by conservatives, Republicans and Southern Democrats. If the principle is as important as I conceive, then the favorable resolution of this issue ranks among the major political challenges of our day.

I say this because, again, the problem today is one of restoring faith. Faith in America requires faith in our

judicial system. This in turn requires confidence that court decisions are free from political influence and properly within the area of judicial review rather than in the arena of political decision-making.

A corollary requirement is that political leaders accept judicial decisions as the law of the land and that efforts to change that law be attempted through constitutional political effort rather than through political attack on the courts, which may furnish example and incentive for more violent attempts to reform the law. In recent times we have seen the beginnings of such political attack, and, whether as a cause or an effect, such attack has been accompanied by a period of increasing lawlessness and violence.

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The Conservative Attack on the Courts

In 1954, Chief Justice Earl Warren announced the unanimous decision of the Supreme Court in *Brown v. Board of Education,* striking down the century-long acceptance of segregated schools in the South.

A series of decisions followed which increased federal regulatory power, expanded the procedural rights of persons accused of violations of law, and further limited state jurisdiction and "states' rights" in areas where state and local governments had long been accustomed to feel free from federal judicial supervision. In *Baker v. Carr,* in 1962, the court enunciated the "one man, one vote" principle, forcing states to reapportion their districts of legislative representation so that one individual's participation in the electoral process was at least roughly equivalent to that of other individuals in his own state.

This series of decisions not only had the effect of giving a rebirth to states'-rights arguments; they also placed the judiciary in direct confrontation with the prejudices of those who wanted segregated schools, those who were wrapped up in the anti-Communism of the 1950s and those who interpreted the benefits of expanded procedural protection to criminal defendants as an unwarranted emphasis