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Dedication of the
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It is a great pleasure to be here at the University of Florida to dedicate the Lawton Chiles Legal Information Center. Your new building is so beautiful, it looks like a Gothic cathedral. With your new high-tech classrooms and your additional library space, you will be well equipped to meet the demands of contemporary legal education. These new facilities are bound to inspire academic achievement, nurture interesting and valuable scholarship, and nourish a sense of community among the school's students, faculty, staff, and alumni.

As magnificent as it is, what I would like to talk to you about today is *not* your new building. Instead, I would like to talk about one important use of the information you will receive as you use this library and what you will do once you leave; the part you will play, whether you know it or not, in maintaining individual liberty and the rule of law.

It's elementary high-school civics that we have three branches of government, which regulate each other by an intricate system of checks and balances. The main check the judicial branch has on the others is the power to declare statutes or executive acts unconstitutional, though sometimes we might check the political branches in a softer way, merely by interpreting a statute in light of constitutional values or by ruling that a regulation or executive act isn't authorized by statute. But whatever courts do, we have the power to make the President or Congress really, really angry. In fact, if we do not make them mad some of the time, we probably aren't doing our jobs. Our effectiveness, therefore, relies on the

knowledge that we won't be subject to retaliation for our judicial acts. As Madison put it—and he, being the Father of our Constitution, should be heard—an independent judiciary is "an impenetrable bulwark against every assumption of power in the Legislative or Executive." Well, *impenetrable* may be putting it a bit strongly. But the basic idea is sound: If you believe, as Madison and I do, that the courts are important guardians of constitutionally guaranteed freedoms in our common-law system, you know that the system breaks down without judicial independence.

Judicial independence is hard to define: Judges can be subject to discipline for legitimate reasons, and the political branches properly control, to some degree, the jurisdiction and political makeup of the federal courts and the various state courts. But, if I may coin a phrase, I know judicial independence when I see it. For instance, suppose, during a period of stormy relations between the White House and the Chief Justice, the President's bodyguards killed the Chief Justice's pet cat. Or suppose the executive branch threatened to cut the water supply to the Supreme Court building to prevent the Court from meeting and making anti-Presidential statements, or the Council of Ministers tried to evict the Constitutional Court from its offices. The first two events actually happened in the early- to mid-1990s in Russia under Yeltsin, and the third happened in Bulgaria in 1995. I think we can all agree that is *not* judicial independence.

Judicial independence doesn't happen all by itself. It's tremendously hard to create, and easier than most people imagine to destroy. That's why the building where I work features a larger-than-life statue of John Marshall, who spent thirty-five years trying to nurture a culture where the political branches were, by and large, willing to acquiesce in the judicial branch's interpretation of the law. They *don't* always acquiesce, but fortunately, most of the time, politicians don't challenge the courts to come enforce their judgments themselves, as Andrew Jackson did in the wake of the Supreme Court's decision in *Worcester v. Georgia*. Creating a culture in the early Republic where, usually, courts' judgments were enforced by the other branches of government is an accomplishment that entitles John Marshall to take his place together with Hammurabi, Grotius, and Confucius—if I may cite foreign law for a second—in the frieze of great lawgivers that appears along the top of the courtroom where the Supreme Court Justices sit.

That is why it is so heartening to see judicial independence take root in young democracies, like some of the newly independent countries of eastern Europe. Ukraine is perhaps the most visible recent example. In the late 1990s, Ukraine's Supreme Court and Constitutional Court repeatedly upheld the rule of law—barring the government from refusing to register candidates or from preventing lawfully elected candidates to take office, enforcing the constitutional prohibition against national deputies' holding

two government positions at once, and so on. When Yulia Tymoshénko—now the Ukrainian prime minister, then a reform-minded deputy prime minister for fuel in the energy sector—was arrested in 2001, the Ukrainian Supreme Court ruled that she had been illegally imprisoned and prohibited attempts to rearrest her. Most recently, of course, during the Orange Revolution of 2004, in the face of tremendous political pressure, the Ukrainian Supreme Court voided the presidential runoff between the two Viktors—Viktor Yanukóvich, the prime minister, and Viktor Yúshchenko, the opposition candidate—which had been tainted by serious charges of voter fraud. The oral arguments, which lasted five days, were marked by a level of transparency atypical for the ex-Soviet world: The proceedings were broadcast live on Ukrainian TV. I hope the experience of the Orange Revolution will set the stage for lasting post-Soviet reform in that country, and I hope that American lawyers will continue to help reformers there and in struggling democracies generally—as they did in the runup to the presidential election, when the ABA's Central European and Eurasian Law Initiative (CEELI), working through American volunteer lawyers, held regional training sessions for judges on election law and its application, helped train political party lawyers, and set up public education seminars at Ukrainian academic institutions.

But of course, not every country is a Ukraine. Maybe some of you have been following events over the last few years in Zimbabwe, the home of what has to be one of the most nightmarish tyrannies in the world today. There, President Robert Mugabe not only decided that white farmers' land should be expropriated and given to blacks, but also instituted a "fast track" procedure to hand over the land before any legal proceedings had been completed. In 2000, a challenge to the fast track procedure found itself in Zimbabwe's Supreme Court. In the middle of election season, 200 demonstrators—Mugabe supporters all—stormed the Supreme Court and occupied the building for two hours; several of them climbed behind the judges' bench, dancing, chanting ruling party slogans, and hammering the bench with their fists. After the demonstrators had been cleared out, the Supreme Court nonetheless ruled that the fast track procedure was unconstitutional. But the Mugabe government ignored the ruling, and the protesters suggested revoking two of the white justices' citizenship. The Chief Justice resigned under intense pressure, including threats of violence by local militias—vocally supported by government ministers—against judges who opposed land reform and their families.

More recently, in 2002, the Supreme Court in Zimbabwe threw out some of Mugabe's election laws, finding that they were improperly ratified and violated voters' constitutional rights. Mugabe nonetheless proclaimed that the laws "shall be deemed to have been lawfully" adopted. A judge on that panel—the last non-black judge on the Supreme Court—resigned, without giving any reasons. Another judge, who in 2003 freed an opposition activist who had been arrested for holding an illegal

rally, was suspended and made to face charges that are widely believed to be trumped up.

Thankfully, our judiciary doesn't have to fear Zimbabwe-style persecution. Fourscore or so years before our Constitution was adopted, the British Parliament passed the Act of Settlement of 1701, which limited the succession to the British throne to Anglicans, but also, more importantly for us, provided that judges would hold office and draw their salaries during good behavior—or, as the statute put it, *quámdiu se bene gésserint*. Now we have Article III, which says basically the same thing, except in English and without the part about the Anglicans. As you can read in the *Federalist Papers*—it's anonymous, but I can tell you this part was written by Hamilton—"The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." This is why, says Hamilton, judicial independence is especially important in the American system. But, as the Founders knew, statutes and constitutions don't protect judicial independence: People do. And the value of judicial independence is a lesson that even some of our leaders perhaps have not learned.

In a recent speech at a conservative conference, a prominent House leader said that "[j]udicial independence does not equal judicial supremacy." In particular, he faulted the courts for their decisions on abortion and school prayer and for improperly citing international law. This was after the Terri Schiavo case, when the federal courts applied Congress's one-time-only statute as it was written, but, alas, perhaps not how the Congressman wished it had been written. In response to this flagrant display of judicial restraint, the Congressman blasted the courts for ignoring Congressional intent. "These are not examples of a mature society," he said, "but of a judiciary run amok." Speakers at that conference advocated "mass impeachment," stripping the courts of jurisdiction to hear certain cases, and using Congress's budget authority to punish offending judges.

Mass impeachments—now that is something we have not heard suggested until lately. Impeachment for a judge's judicial acts has been politically taboo since the failure of Justice Samuel Chase's impeachment back in 1805. Jurisdiction-stripping proposals are nothing new, though their ancient use is no defense. In the 1950s, the proposals suggested stripping federal courts of jurisdiction over desegregation and domestic-security cases; in the 1960s, the controversy was over the admissibility of

confessions in criminal cases; in the 1970s, it was over busing; in the 1980s, it was about abortion and school prayer; and now we have the Pledge of Allegiance and gay marriage thrown into the mix as well. Congress has never given Article III courts as much jurisdiction as the Constitution allows, and quite frankly, most federal judges think we have quite enough cases as it is. Article III allows Congress to make exceptions to the Supreme Court's jurisdiction, and even abolish lower courts entirely. The merits of all these measures are debatable—as long as they're not retaliation for past federal court decisions.

It gets worse: In all the federal courts, including the Supreme Court, death threats have become increasingly common. Judge Greer, who handled the Schiavo case down here for over a decade, has received 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 window was once shattered by a gun shot. It doesn't help when a high-profile senator, after noting that decisions he sees as activist cause him "great distress," suggests there may "a cause-and-effect connection" between such activism and the "recent episodes of courthouse violence in this country."

These comments have all come from Republicans, but of course Republicans aren't the sole offenders. A former Democratic president complained, in words that sound much like current congressional complaints, that "the Court has more and more often and more and more boldly asserted a power to veto laws passed by the Congress and by state legislatures. . . . The Court has been acting not as a judicial body, but as a policymaking body." He accused the Court of "improperly set[ting] itself up as a third house of the Congress—a super-legislature . . . —reading into the Constitution words and implications which are not there, and which were never intended to be there."

Like some members of Congress, this former president paid lip service to judicial independence, saying, "I want—as all Americans want—an independent judiciary as proposed by the framers of the Constitution"—but made clear that he did *not* mean "a judiciary so independent that it can deny the existence of facts which are universally recognized." He believed in "a government of laws and not of men," but believed that this meant "we must take action to save the Constitution from the Court and the Court from itself." This president's plan was "simply this: [W]henever a judge or justice of any federal court has reached the age of seventy and does not avail himself of the opportunity to retire on a pension, a new member shall be appointed . . . ." I'm sure you all remember, that was Franklin Roosevelt's fireside chat of March 9, 1937. He's the fellow on the dime.

Now President Roosevelt was in many ways a great and important president, but surely this was not his finest hour. I am not against limiting

judicial terms, although the Constitution does not provide for such for federal judges. A retirement age of, say, 75 or so might be reasonable. Anyone who's read some of my opinions knows I do not take a formalistic approach to these questions, and it takes more than reciting the mantra of "judicial independence" to get me worked up. But, as I said before, I *am* against judicial reform driven by nakedly partisan, result-oriented reasoning.

The experience of developing countries, former communist countries, and our own political culture teaches us that we must be ever vigilant against those who would strong-arm the judiciary into adopting their preferred policies. It takes a lot of degeneration before a country gets to be Zimbabwe. But if I might coin a phrase, we should avoid these ends by avoiding these beginnings. I recently read a *Washington Post* op-ed called "A Court Too Supreme For Our Good," where a Washington lawyer called me and my colleagues "increasingly isolated, imperious and opaque," and advocated, as what he called one "modest step toward a healthier relationship with the public—and toward a healthier measure of accountability," that Congress "cut the Supreme Court's budget until it agrees to allow cameras and audio equipment into all federal courtrooms." Given the political climate, and the tenuous grip many people have on the concept of judicial independence, when I hear a threat to cut judicial budgets, even when it is only about cameras, I get really worried.

This is where you come in. There is no natural constituency for judicial independence—except perhaps for a vibrant, responsible lawyer class, like the people who will be educated in this building in the years to come. We can't just trust the courts to protect themselves. For one thing, someone has to people those courts, on both sides of the bench; and those someones are you. For another, much of what makes a true threat to judicial independence is the offending politician's motivation, which we in the courts are often ill-equipped to ferret out. So the best defense against such threats is the maintenance, and expansion, of our precious legacy: a culture in which such threats are frowned on and are therefore unlikely to even get off the ground. If I might coin another phrase, we cannot dedicate—we cannot consecrate—we cannot hallow—this building. Rather, it is for the students and professors who use these new classrooms, and the new library space and offices in the old buildings that this construction has made possible, to be dedicated to the practice and promise of our Anglo-American common-law tradition, which makes the courts—armed with the power of judicial review and protected by judicial independence—part of the people's arsenal to enforce the rule of law and protect individual freedoms.

Think about that as you use your splendid new building. I hope it makes all the noise, demolition, construction, and flooding you have suffered over the past year or so worthwhile.