Judges are feeling the heat in a year that has been marked by increasingly strident criticism of the judiciary.

After courts failed to intervene in the Terri Schiavo case, House Majority Leader Tom DeLay vowed that judges would have "to answer for their behavior." More recently, DeLay held forth at Justice Sunday II, a rally in Nashville, Tenn., led by prominent Christian conservative groups.

Citing recent U.S. Supreme Court decisions on abortion, obscenity and government support for religion, DeLay declared: "That's not judicial independence. That's ... judicial autocracy."

Challenges to the judiciary are scarcely confined to the level of rhetoric. Indeed, a number of concrete measures have been proposed to curtail judicial authority. On the federal level, legislation has been introduced to limit the jurisdiction of federal courts over various matters related to religious faith. Earlier this year, House Judiciary Committee Chairman F. James Sensenbrenner Jr. announced, in a speech at Stanford University, that the committee was investigating whether Congress needed "to create an office of inspector general for the federal judiciary."

Other, more general, challenges to judicial independence include efforts to curb the power of judicial review, establish term limits for judges and reduce funding for the courts, which are already burdened with excessive caseloads.

Judges at the state level face more immediate challenges. Thirty-nine states rely on some form of popular vote to elect some or all of their judges. In these states, judicial elections have become increasingly issue-driven, partisan contests, often centered around controversial rulings. Moreover, the costs of judicial campaigns have risen exponentially over the last decade. (See "Mud and Money," February 2005 ABA Journal, page 40.) The surge in campaign costs, swelled by the increased involvement of special interest groups, leaves state judges even more exposed to outside pressures.

Criticism of the courts and battles over judicial philosophy have long been features of American politics. But some of the recent criticism of the judiciary, which has intensified as political divisions have widened, hasn't been particularly constructive. We look at the issues in a more healthy, public-spirited debate in the following roundtable discussion.

Professor Erwin Chemerinsky: I'd like to begin by asking what you think is the greatest threat to judicial independence today.

Justice Christine Durham: It's a difficult question because I think judicial independence is subject to erosion in many areas. Perhaps the greatest threat is a renewal of the debate about the nature of judicial decision-making. In a very cynical environment, we hear a great deal of discussion about whether judges are really just politicians in black robes. And to the extent that you erode a communal sense of respect for an independent judiciary, you erode opportunities to shore it up.

Historically, we have valued an independent judiciary and shored it up with a great many institutional supports, chief among them the federal and state constitutions. And it's very unfortunate when politicians and social scientists begin to propagate the theory that judges are really political animals and

there's no real difference between the function of the judicial branch and the other two branches of government.

Professor John McGinnis: I agree, but I would put a different emphasis on it. I think the greatest threat to judicial independence may be the actions of the judiciary itself. Beginning with the Warren court, the judiciary has, at least in some decisions, erased the difference between legislation and interpretation. I think judicial independence is dependent on a concept of judging that can distinguish legal interpretation from politics. And if that distinction is eroded, that is a threat to judicial independence. I don't think that these critics are being cynical but instead are describing what to me is a worrying development that has occurred, particularly in the last 50 years.

Professor Michael Tigar: Well, I think the biggest threat to judicial independence is once again the executive branch of government. We have a situation in which the executive branch has, first, decided to trivialize the obligations of the United States under treaties such as the Geneva Convention and then, systematically and quite cynically, it has positioned itself so as to prevent judicial oversight of the rights of people who are subject to actions such as detention and torture. And it has compounded that by being less than candid with the courts.

Rep. Tom Feeney: I'll define how I understand judicial independence. I believe judges should be independent from undue coercion by the executive branch and the legislative branch. And judges actually do have a great deal of independence that is set out in the Constitution. For example, we can't remove them during a lifetime of good tenure. We can't reduce their salaries. We don't have the ability to overturn their judgments. I mean, that's an extraordinary amount of independence.

On the other hand, if you mean that judges ought to be either free from criticism or independent from the language of the Constitution and the text of the law itself, that's the sort of independence that can create a group of philosopher-kings, a government by an oligarchy of the wise and elite. The biggest threat to judicial independence, in my view, is the overreaching of the courts in either modifying or amending the original text of the Constitution, or substituting their biases and judgments for those of elected legislators.

Robert Utter: My concerns are more generalized, and they are based on the realization that the ultimate power of the courts comes not just from laws and the Constitution but from the expectation of the public.

The public expects courts to be able to render decisions independently, to act without restriction, improper influence, inducements, pressures, threats or interference direct or indirect. This expectation is at the heart of our system of government and must be maintained; anything that detracts from that is a threat not just to the courts but to the separation of powers and our form of government. More specifically, I'm concerned about the impact of cash in judicial elections, particularly in the last five years, and the issue of state funding. I think those two areas go directly to the independence of the state courts. As to the federal courts, the criticism of the courts and the diminution of jurisdiction are matters of true concern.

Chemerinsky: As I listen, I hear three different, interrelated things. One goes to criticism of the courts. One goes to the actions of the executive. And the third goes to the role of funding in judicial elections.

In terms of popular criticism of the courts, one might respond by noting that there's always been criticism. In the 1930s, it was particularly intense. And also in the '50s: There were a hundred members of Congress who urged disobedience of Brown v. Board of Education. And today, some would argue, we're at another point when society is extremely divided, so the courts get criticized.

Tigar: Judges, especially when engaged in protecting human rights, are engaged in a countermajoritarian exercise. And we depend vitally upon voluntary compliance with judicial rulings because otherwise we'd be a totalitarian state. There is a difference between social scientists and newspapers debating judicial decisions and attacks by majoritarian institutions on the right of judges to make such decisions. I think majoritarian institutions ought, in our system, to be careful about how they go after this countermajoritarian institution that has neither the power of the purse nor the sword.

McGinnis: Well, I want to make the distinction between criticism of the court and removing a justice from the court for a particular decision. The latter seems to me a clear threat to judicial independence, and I think we're very far from that. But criticism of the court is wholly justified. Historically, judges have not been immune from criticism by politicians, and I believe that's largely a good thing.

Durham: One of our concerns has to be about efforts, which are widespread, to ensure and extract, either from sitting judges or from candidates for judicial office, commitments that they will decide cases in accord with a certain economic and political agenda. The special-interest financing and funding of state judicial elections is truly a modern phenomenon of startling proportions. And it does seem designed to ensure that judicial decision-making will be dictated to.

Feeney: I think that's a very good point. In the last 20 years we've seen this intense activism, from public officials as well as interest groups, as we select judges. I believe that's in large part due to the perception that judges and justices are not adhering to the text of the Constitution and the law itself but instead are often making law. All of a sudden it becomes very important whether a candidate is a conservative or a liberal, an activist or a restrained judge. In the old days, most of us believed that justices put aside their biases and strictly adhered to interpreting the meaning of the original text of the Constitution and the law. We didn't really care what their biases were, and there was less reason to become politically engaged.

Tigar: I recognize that judicial decisions have traditionally been the subject of debate in all the other branches. That's not the issue here. But if we want to talk about the distinction between legitimate and illegitimate pressure, let's look at the recent dispute over the sentencing guidelines. There is a federal judge in Minneapolis, James Rosenbaum. Under the sentencing guideline regimen, he would, from time to time, depart downward. His departures from the guidelines were subject to criticism. Fine and good, but it didn't end there.

Members of Congress started trying to get at his internal judicial papers, calling him back to Washington, harassing him, making it very difficult for him to maintain his independence. That went on

to the extent that the chief justice of the United States, no screaming liberal, he, criticized this assault upon the independence of the judiciary. That's what I'm talking about: While members of Congress are free to do whatever they want, they've got their powers, it seems to me that as a matter of prudence, this kind of interference is something they ought to think twice about.

Chemerinsky: Rep. Feeney, did you want to respond with respect to the sentencing guidelines? That may lead to a more general question. I wonder if it's possible to talk about judicial independence without the disagreement ultimately coming around to the merits of the disputes. Is the worry here not judicial independence but, rather, the merits of disputes, whether it be the merits of downward departures from sentencing guidelines or the merits of Roe v. Wade?

Feeney: Well, departures were supposed to be extremely rare, according to the guidelines passed in 1984. I think it's appropriate for Congress to exercise some oversight when we establish federal crimes, federal sentencing guidelines, and then justices or judges take it upon themselves to criticize and regularly ignore those guidelines. But criticism, oversight I think Congress has an absolute constitutional obligation to engage in it. Fundamentally, it is not inappropriate for Congress to regulate the jurisdiction of the federal courts. In fact, Article III only requires, if you read it technically, the establishment of a Supreme Court. All lesser and inferior tribunals are established by Congress. I believe that what Congress can establish under the Constitution, it has the power to either restrict or abolish. We establish what a federal crime is.

Tigar: That view of the power of Congress to restrict the jurisdiction of federal courts is, in my view, flat wrong and is contradicted by several Supreme Court decisions.

Durham: If I might just shift the focus, I think there are some significant differences with state courts. The disputes come down to questions and debates about the merits of the outcome. State courts have a different scope when construing state constitutional provisions and protecting rights guaranteed under them. The concept of judicial review is entirely explicit in those state constitutions, and there really is no question about state legislatures having the power to diminish the scope of that review.

I can think of a dozen examples where a particular decision, with all the appropriate and traditional instruments of judicial interpretation having been applied, has been the pretext for a state legislature to say to a state judiciary, "Fine. We'll cut your budget," or, "We'll call for impeachment of the judge who wrote the decision." These kinds of responses are, I believe, on the increase.

Chemerinsky: If a state legislature responds to a particular decision it doesn't like by threatening to cut the budget or by beginning impeachment procedures against the justices there, is that a threat to judicial independence? Or is that also permissible within the scheme of the separation of powers?

McGinnis: My understanding of the U.S. Constitution is that it does not encompass removing a judge for a decision, so that would be improper. I think there are clear rules at the federal level that protect judicial independence.

Durham: I don't think there is a state constitution in the country that permits impeachment for the substantive work of a judge. What I'm concerned with are the calls for impeachment and, in some states, the actual institution of procedures being used for harassment.

Tigar: And these attacks occur particularly in states where judges are elected. Now, in those states impeachment may not be necessary. You just outspend your rivals and replace the judge at the next election.

Feeney: From the legislative perspective, I can tell you I have never believed it's appropriate to use the power of the purse to punish the courts. Some of my colleagues disagree. They react viscerally to things they don't like, and so, in my view, there is some fair criticism of the legislative branch's abuse of prerogatives.

Chemerinsky: I want to address the matter of candidates for judicial office choosing to or being forced to talk about their views on issues that are likely to come before them. Is this a threat to judicial independence, or is it entirely appropriate?

Feeney: As a congressman, I believe it's a threat. A judge talking about his experience, background even his jurisprudential approach is appropriate. But I'm disheartened when judges feel forced to accommodate questions or to expressly cater to voters on the campaign trail. I think that taints what I want, which is a totally dispassionate umpire who will subjugate his biases and prejudices to the law itself. I think we're increasingly moving away from that model of judge.

Tigar: I agree, but I'd go a step further. I think that the executive branch, in nominating judges, should not use expressed or implied statements about what they think are good kinds of judicial decisions and what they think judges should and shouldn't be doing.

McGinnis: This goes back to what I think is the crucial condition for judicial independence, which is to separate judging from politics. Once we ask judges for their position on X, Y and Z, we start looking very much like a political platform. In contrast, I don't think it is inappropriate for the president to consider jurisprudential philosophy. Are potential judges originalists? Do they believe in something called the "living Constitution"? I would encourage those kinds of questions.

Chemerinsky: There seems to be a consensus among us that it's inappropriate for candidates to state their views on specific issues, but they're permissible on a more abstract level. If you start with the premise that an individual's views on issues are likely to determine how he or she is going to vote on those issues, then why not know what those views are?

Utter: The American Judicature Society came out with a statement that said ideology "should not play the sole or even a primary role in the nomination and confirmation process." They believe that judges "should be chosen on the basis of established legal credentials, an ability to decide cases based upon their facts and the law, and a demonstrated capacity for open-mindedness, sound judgment and evenhandedness." I subscribe to that. Feeney: If I can pick up on that: A judge, having voiced an opinion

before getting on the bench, will have his or her credibility undermined. When there is a similar case later, the parties will already feel like the deck is stacked.

Chemerinsky: Let me go to another aspect of the judicial selection process: the issue of raising money and how that affects judicial independence.

Utter: In my own state's most recent Supreme Court election, a well-qualified appeals court judge was opposed by a bright, very well-educated lawyer who represented a number of private interests. From these groups, that candidate was able to outraise, 3-to-1, the appeals court judge and won the seat in his third attempt. There's no question that the money tipped the balance. The question is whether those special-interest groups will have an impact on his decisions in the court.

Feeney: Money, being the lifeblood of politics, is a necessary evil that we'll never do away with in a democratic electorate. I happen to support a free flow of money with disclosure. But as Madison pointed out in "The Federalist No. 10," factions being inevitable and he meant special interests, of course the more the merrier because it defuses power.

As a congressman, I may have 1,000 or 10,000 individual donors with myriad, often conflicting interests. Whereas in judicial elections, you tend to have, for example, the tort reform group vs. the anti-tort reforms group or the pro-regulatory group vs. the opposing group. You see very narrow groups of people taking an interest in judicial elections. And you don't have the dispersal of factions that Madison intended as he described in "The Federalist No. 10."

Durham: I think that's right. And the idea of public financing is based on the notion that you ought to have spending limits, and that taxpayers not private interest groups should support the judicial election process.

McGinnis: I'm generally skeptical of those kinds of schemes. I think restricting campaign donations is another attempt, which always fails, to get the politics out of politics. Other nonmaterial interests will have a lot of influence, particularly insiders. Lawyers, in the context of judicial elections, will have a lot of influence. Newspapers will have a lot of influence. I think a lot of the campaign restrictions will have counterproductive consequences, allowing different kinds of interests the press, the pundits and lawyers themselves to influence the election.

Chemerinsky: I'd like to conclude by returning to professor Tigar's opening remarks, in which he stated that he thought the actions of the executive branch now pose the greatest threat to judicial independence.

Feeney: I would point out two things. First, every executive branch has been aggressive in advocating for its positions in front of the Supreme Court. Second, when you talk about individual rights or civil liberties, are you talking about the rights of enemy combatants? Those issues are certainly fair play for the administration in a time of unprecedented threat.

McGinnis: I want to add that these issues are being vigorously disputed in the courts. This is a question about the interpretation of law, the extent of judicial authority. So long as those issues are being argued

in the courts, and those who oppose the administration's view are well-represented, I don't see any threat to judicial independence. We have to argue where that line is going to be drawn.

Tigar: Professor McGinnis, with all respect, that view simply belies the lessons of every major conflict in the history of the United States. In the Japanese relocation decision, of course, that was argued and argued ably in the Supreme Court. And then because the court felt that it needed to accept executive arguments about the need for circumscribed judicial action, the court decided what it did [upholding the internment of Fred Korematsu during World War II].

As a result of the executive branch overreaching, 60 years later, how does it turn out? It turns out the decision was based on false evidence presented to the court, a misapprehension of the extent of the danger. More important than that, that decision made, yes, in a time of unprecedented national danger, redounds to this day to the discredit of the United States. It diminishes our image as the primary protector of individual liberty in the world.

McGinnis: I think, again, that's a point of debate, and it may well be that Korematsu v. United States was wrongly decided, but that's very different from a threat to judicial independence. My worry is that we confuse and trivialize the issue of judicial independence if we start saying it's really about our disagreement or where we're going to draw the lines in the war against terror.

Tigar: Let's take the case of Yaser Esam Hamdi, for example. The advocate for the United States in the Supreme Court said Hamdi was a dangerous terrorist; you couldn't possibly have judicial review; you really needed to defer to executive action. The court then holds [that Hamdi is entitled to a lawyer and to challenge his detention], and the next thing we know he's on an airplane to Saudi Arabia.

It's that kind of irresponsibility overstating the facts and then, as the executive does, hiding behind secrecy to prevent judicial review that is a threat to judicial independence. Yes, there's a debate going on, but it's a debate in which those who seek to establish and maintain individual rights are arguing with one hand tied behind their back.

Sidebar

The Participants

• Erwin Chemerinsky, the moderator, is a professor of law and political science at Duke University.• Christine M. Durham is chief justice of the Utah Supreme Court. She is a past president of the National Association of Women Judges and a former member of the ABA Commission on Women in the Profession.• Tom Feeney is a Republican member of the U.S. House of Representatives from Florida's 24th district. He authored the 2003 Feeney Amendment, which limits downward departures from sentencing guidelines, and co-sponsored the Feeney/Goodlatte Resolution, which discourages the U.S. Supreme Court's use of foreign law to interpret U.S. law.
• John McGinnis is a professor of law at Northwestern University. He served as deputy assistant attorney general in the Department of Justice's Office of Legal Counsel from 1987 to 1991.• Michael Tigar is a professor of law at American University's Washington College of Law. He was the chair of the ABA's

Section of Litigation from 1989 to 1990.• Robert F. Utter served on the Washington state Supreme Court from 1971 to 1995. He was chief justice from 1979 to 1981. Since leaving the court, Utter has worked in the field of arbitration and mediation and also has been actively involved with the ABA's Central European and Eurasian Law Initiative.