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Pressure Is a Privilege: Judges, Umpires, and Ignoring the Booing of the Crowd

The Honorable James C. Ho

KEY TAKEAWAYS

There have been plenty of threats about packing the courts, but there's no need to pack the courts when you can just pressure the courts and get the same result.

Judges can and do disagree in good faith about the interpretation of legal rules. We should be able to disagree with one another without despising one another.

Judges must have not only the intellect, but also the fortitude to be impartial—no matter how angry the crowd. Judges must not be afraid of being booed.

JOHN G. MALCOLM. This lecture has been named in honor of one of our country's most eminent judicial and legal scholars, a man who in fact distinguished himself in many different ways.

Joseph Story was involved in politics and civic activities in his native state of Massachusetts. After several years in private practice, he served in the Massachusetts State Legislature, for part of that time as Speaker of the House, and in the United States Congress—pretty remarkable when you consider that he did all that before being confirmed as an Associate Justice of the Supreme Court at the age of 32, the youngest Justice in our nation's history. In addition to serving with distinction on the High Court for 33 years, Story was instrumental in establishing the Harvard Law School and served as its Dane Professor of Law.

Story was also an accomplished writer whose articles and books were praised on both sides of the Atlantic. His most famous work was his *Commentaries on the Constitution*, which demonstrated his commitment to faithfully interpreting the Constitution as it was understood by those who wrote it and ratified it. The influence of Story's *Commentaries* continues to be felt today among the judiciary and constitutional scholars.

We are fortunate indeed tonight to have Judge James Ho as this year's Story Lecturer. Judge Ho sits on the on the U.S. Court of Appeals for the Fifth Circuit, having been confirmed in January of 2018.

Prior to becoming a judge, Judge Ho was a partner at Gibson, Dunn & Crutcher and also served for three years as the Solicitor General of Texas. In each of those three years, Judge Ho won a Best Brief Award from the National Association of Attorneys General, which comes as no surprise to anyone who has read those briefs or any of his judicial opinions.

Judge Ho also served as chief counsel of the Senate Judiciary Committee's Subcommittees on the Constitution and Immigration and as a Special Assistant to the head of the Civil Rights Division and as an attorney-advisor in the Office of Legal Counsel at the Justice Department.

Judge Ho began his legal career as a law clerk to Judge Jerry Smith, who is now his colleague on the Fifth Circuit, and to Justice Clarence Thomas on the Supreme Court. Many of us would be happy to see Judge Ho serve as Justice Thomas's colleague on that court too.

Please join me in welcoming to the stage Judge Jim Ho.

THE HONORABLE JAMES C. HO. Thank you, John, for the kind introduction. I'm honored to deliver this year's Joseph Story Lecture.

John and I have been friends since we were both at the Justice Department back in 2001, but my history with The Heritage Foundation goes back even further. Twenty-five years ago this week, I attended my first Heritage Legal Strategy Forum. General Meese had invited me to present a law review article I co-authored about racial preferences and illegal appointments at the Justice Department.[1] Soon after, he sat down with me for an interview for the *Green Bag* on the importance of originalism.[2]

I was just a law student, so you can imagine the formative and lasting influence that General Meese had on me. He inspired me to pursue public service, and he gave me the confidence that I could actually do it. And for that, I'm profoundly grateful.

An American by Choice

One of my favorite privileges of being a federal judge is the honor of presiding over a naturalization ceremony. I do it every year in May to celebrate the anniversary of my own naturalization in May 1982.

I wasn't born in the United States. I didn't enter this world as an American, but I wake up every morning thanking God that I will leave this world as an American. I like to say that I'm Taiwanese by birth, Texan by marriage, but most importantly, I'm American by choice.

If you've never attended a naturalization ceremony, there's nothing more inspiring. People from all around the world come together in one room, for one purpose—to become Americans. As Americans, we should never forget how special it is to live in a place that people around the world would do anything to join. There aren't a lot of countries you can say that about.

It reminds you that people aren't desperate to come to America in droves because it's a failed nation. They're desperate to come to America because it's the most successful nation in human history, and it's worth thinking about why that is. It's not because we're all the same, because we're not. We're different in so many ways. We look different. We come from different backgrounds. We practice different faiths. We hold different opinions on various subjects. And we disagree on so very many things.

In a nation of over 300 million Americans, we're never going to agree on everything. We're all committed to the same basic principles of liberty and equality, but we have vigorous disagreements and boisterous debates about what those principles require in practice. So how are we supposed to come together when we disagree so passionately about so much?

Our nation's Founders debated this very topic. The Federalists believed that, despite our differences, the former colonies would be far better off together as one united country—that we would enjoy numerous economic, diplomatic, security, and other advantages that flow from scale.[3]

The Anti-Federalists thought that was crazy. They reminded us that no republic had ever succeeded anywhere near this size. They feared that we were *too* diverse. They worried that we'd bicker endlessly. They believed that we would be better off apart.[4]

The Federalists prevailed by offering two critical ingredients for avoiding endless conflict: federalism and freedom of speech. We would do at the national level what must be done at the national level, but we would leave ample space for differing viewpoints, and we would have the freedom to advocate and advance our beliefs in our respective communities.

Institutions of Higher Education or Incubators of Bigotry?

But we cannot lightly assume that these Founding values will always persist. They must be nurtured and taught. They must be passed down from generation to generation. As President Reagan warned:

> Freedom is never more than one generation away from extinction. We didn't pass it to our children in the bloodstream. It must be fought for, protected, and handed on for them to do the same, or one day we will spend our sunset years telling our children and our children's children what it was once like in the United States where men were free.

Allyson and I are blessed with a twin daughter and son. They're the joy of our lives, but when they bicker, they really bicker, and when they do, you can predict what happens next: retaliation. "If you won't agree with me, you can't come into my room. You can't play with my toys. You can't borrow my books. And no, I won't talk to you except to tell you that I won't talk to you."

But here's the thing: Kids are supposed to grow out of it. We're supposed to instill in them values like respect and charity. We're supposed to teach them that there will always be disagreement but that we should always try to presume good faith from our fellow man, that we often have more to learn from those we *disagree* with than those who are already with us; that we have established, peaceful, respectful ways of resolving our differences; and that, win, lose, or draw, we're better off together than apart.

As parents, we're supposed to teach these principles to our children, and these lessons are supposed to be reinforced by teachers, colleges, and universities. Unfortunately, our nation's institutions of higher education don't seem to be fostering these principles very well. Students today don't value the rigorous exchange of ideas the way we used to.[5]

According to the Brookings Institution, 50 percent of college students say it's OK to shout down any speaker you disagree with. One in five say that violence may be appropriate.[6] That was back in 2017. The numbers may be even higher today. According to a 2023 survey by the Foundation for Individual Rights and Expression, two-thirds of college students say it's OK to shout down a speaker you oppose,[7] and 41 percent of students now say that violence may be appropriate, according to a 2022 Buckley Institute report.[8]

So it's no wonder that we're seeing more and more disruptions on law school campuses nationwide—against respected legal scholars, accomplished litigators, and an increasing number of federal judges. Campus

disruptions seem to be happening more frequently, and when they do, they're getting more attention.

But these campus disruptions aren't the core problem. They're just a symptom of the problem. The real problem in the academy is not disruption but discrimination: rampant, blatant discrimination against disfavored viewpoints, against students, faculty, and anyone else who dares to voice a view that may be mainstream across America but contrary to the views of cultural elites. And let's just say it: The viewpoint discrimination we most often see in the academy today is discrimination against religious conservatives.[9]

Just look at the dramatic absence of intellectual diversity on our nation's college faculties and among university administrators. What message does it send when colleges and universities *say* they believe in diversity but systematically exclude certain views from the faculty lounge? It says that viewpoint diversity may be important but that some views are beyond the pale. It says that it's OK to exclude the deeply held, good-faith views of millions of our fellow countrymen from the nation's discourse.

The typical justification you'll hear for this discrimination is that some religious conservative views are just too much, they make people feel unsafe, so it's OK for us to eliminate these views from campus. But that's not why they're expelling these viewpoints from campus. They're not doing it for safety reasons. They're doing it for substantive, ideological reasons—for discriminatory reasons.

Just compare and contrast what we've seen on campus *in the past* to what we've seen *in recent weeks*.

- Expressing religious viewpoints gets you vilified, but claiming a right to eliminate a religious group gets you the benefit of the doubt.

- Voicing traditional values makes people feel unsafe, but supporting terrorism against innocent civilians doesn't.

- Speech is violence—unless it's speech that cultural elites like.[10]

Is there an underlying principle here? I'm not sure there is. I wonder if what's really going on is that some people are favored while others are disfavored; some people are deemed oppressors, and others, the oppressed. It's wrong. It's un-American.[11] And it's driving more and more Americans to ask if our nation's colleges and universities are institutions of higher education or incubators of bigotry.

Undermining the Third Branch of Government

The state of higher education concerns me, and it's not just because our nation's law schools directly impact the work of the judiciary and help constitute the future leadership of our country. It's also because the same toxic discrimination that distorts discourse on college campuses also distorts discourse about the courts. It's the same mindset that motivates the current campaign to undermine the third branch of government.

One of the things you're told during the Senate confirmation process for federal judges is that if you say that you're an originalist, you should expect controversy, but it shouldn't be controversial at all. Every judge swears an oath to uphold the Constitution, so being an originalist is just part of the job description because being an originalist just means being faithful to whatever text you're interpreting.

Justices Scalia and Thomas repeatedly described themselves as "originalists." So have other members of the Supreme Court. Justice Ginsburg said that she "count[s] [her]self as an originalist, too." Justice Kagan declared during her Senate confirmation hearing that "we are all originalists." Justice Jackson likewise testified that "[a]dherence to text is a constraint on my authority.... You're bound by the text and what it meant to those who drafted it."[12]

So there's a broad consensus in favor of construing legal texts as written, consistent with their original understanding and public meaning. Or at least there's consensus as a matter of theory. It's when you start to apply originalism in certain specific contexts that controversy emerges—when originalism leads to results despised by the cultural elites who lead the national discourse.

When that happens, originalists face a concerted campaign of condemnation. Originalists are disparaged and destroyed. We're not merely wrong as an intellectual matter. We're not just disagreeing in good faith about the proper meaning of legal terms. We're fundamentally bad people who are too extreme for polite society. We're mean-spirited, racist, sexist, homophobic. We're just trolling—or auditioning. We're unethical—if not corrupt.

It's obvious what's going on here. There have been plenty of threats about packing the courts, but there's no need to *pack* the courts when you can just *pressure* the courts and get the same result.

It's the same pathos we see on college campuses: It's not enough that I disagree with you; I also have to dislike you and disparage and disrespect you as a human being. Instead of judging your reasoning, I pass judgment on the person behind it. I don't presume good faith; I impute malicious

intent. It's a sad way of looking at the world, and it's a bizarre approach to understanding a judiciary that is expressly committed to originalism.

I'll give you a recent example. A few months ago, the Supreme Court decided a criminal case called *Counterman v. Colorado*.[13] The victim in that case is a professional musician who received thousands of threatening and disturbing messages from the defendant over a number of years. This defendant had previously served time for terrorizing at least four other women, and he was eventually convicted and imprisoned for more than four years for criminally stalking this victim. Yet she remains terrified of him (and in hiding) to this day. To protect her anonymity, the Court's recent opinion refers to her only by her initials.

By a vote of 7–2, the Court overturned the conviction as a violation of the First Amendment on the theory that the prosecution wasn't required to prove a particular mental state for the defendant. Justice Kagan authored the majority opinion. Justice Sotomayor wrote a concurrence. Justices Thomas and Barrett dissented.

I disagree with the ruling and suggested as much in an opinion earlier this year. So did Allyson, who filed an amicus brief on behalf of the victim before the Supreme Court. But although we disagree with the opinion, we would never question the good faith of the Justices, and we certainly would never suggest that any member of the *Counterman* majority is sexist or favors violence against women.

Yet that's exactly what at least one leading law professor has done. A few weeks ago, a professor at Georgetown accused the Justices in the *Counterman* majority of "blindness to gender violence." She called the Court "the enemy of popular laws devised to protect women."[14]

I don't have to agree with the majority in *Counterman* to recognize that these disparaging remarks are badly mistaken—and deeply insulting. And I'd say the same about many other attacks we've recently seen against the Justices in other areas of the law.

Judges can and do disagree in good faith about the proper interpretation of legal rules. We should be able to disagree with one another without despising one another—even in cases like *Counterman* where passions understandably run high.

Booing the Umpire

But no matter how absurd or hateful the critics, I thank God that I live in a country and under a Constitution that guarantees everyone the right to criticize our officials.

That includes judges. In fact, if anyone in public office should be able to ignore criticisms and just do their job, it's those who enjoy life tenure. Citizens have every right to expect federal judges to follow the law in every case, no matter how belligerent or baseless the booing of the crowd, because that's the job. And that raises the question: How are we doing in these jobs?

The Chief Justice famously compared judges to umpires during his confirmation hearing.[15] It's a good metaphor in many respects, but I also wonder if comparing judges to umpires is ultimately comforting—or discomfiting.

If you're a sports fan, you're no doubt familiar with the phenomenon of home-field advantage. There's a fascinating book called *Scorecasting*. The authors devote an entire chapter to the topic of home-field advantage.[16] Based on extensive analysis, they conclude that home-field advantage is a real phenomenon, that the leading cause of home-field advantage is the referees, and it's because the referees are responding to the hometown crowd. As it turns out, most people don't like to be booed. Most people like to be liked, and refs are no different.

The authors begin their analysis with the observation that referees and umpires are "professionals, uncorrupted and incorruptible, consciously doing their best to ensure fairness.... They are not, however, immune to human psychology, and that's where...the explanation for home team bias resides" because when they're "faced with enormous pressure—say, making a crucial call with a rabid crowd yelling, taunting, and chanting a few feet away—it is natural to want to alleviate that pressure."[17]

The authors look at various studies across different sports. In one study, a group of refs watched a soccer game on TV with the sound turned on while another group watched the same game on TV but in silence. The group watching the game with the sound on called fewer penalties against the home team and more against the away team than the group watching the game in silence. The natural inference is this: The refs were influenced by the booing of the crowd.[18]

Other studies show referee bias across a wide range of sports and the greatest amount of bias when the game is close. In baseball, home teams strike out less and walk more than away teams. In football, away teams are penalized more than home teams, particularly when the penalty results in a first down for the offense. The authors also found similar effects in basketball and hockey.[19] They ultimately concluded that "referee bias from social influence not only is present but is the leading cause of the home field advantage."[20]

The COVID-19 pandemic has actually given us a chance to test this hypothesis in the real world. Due to government lockdowns, we now have

experience running live soccer games without a hometown crowd, and it turns out the authors were right: "Without crowds, referees penalize home teams as much as away teams."[21]

The "Gold Star" Syndrome and Fair-Weather Originalism

If we take the Chief Justice's umpire metaphor seriously, we also need to be aware—and wary—of what that metaphor foretells. Americans are passionate about our sports teams, but we're also passionate about our politics, and in sports and politics alike, judges must have not only the intellect, but also the fortitude to be impartial—no matter how angry the crowd. Judges must not be afraid of being booed.

Here's the problem: There's good reason to worry that judges are, if anything, even *more* susceptible to home-town bias than umpires. For umpires and referees, the booing is transient, fleeting. You make the call, the fans boo, but it lasts only a few seconds. The game moves on, the crowd moves on, and no one knows who you are. They don't know your name. So the moment passes; it doesn't follow the ref.

That's not true with judges. Most fans don't know the name of the ref who makes a call they dislike, but it's easy to look up the judge who writes an opinion you despise, and people can spend their whole life publicly disparaging that judge by name.

Now, you might think: Isn't that why judges have life tenure—to make sure they ignore public opprobrium and just do their jobs? And of course you'd be right. Public criticism isn't supposed to have any impact. Judges and refs are supposed to follow principle, not popularity, in their decision-making. Judges, like refs, should know that whether a decision is lawful is orthogonal to whether it is loved.

That leads me to a second, even more important reason why booing can make a bigger difference on judges than on refs. I call it the "gold star" syndrome.

When you look at the typical resume of a federal judge, you often see a bunch of fancy credentials—fancy law schools, fancy clerkships, fancy law firms and government jobs. With folks like that, with people who are typically used to collecting gold stars, they tend to be motivated by one overarching objective: getting even more gold stars.

A Harvard undergraduate recently published a remarkably self-aware essay in *The Wall Street Journal*. Here's what she said:

> Our life's mission has been to please those who can grant or withhold approval: parents, teachers, coaches, admissions officers and job interviewers. As a result, many of us don't know what we believe or what matters to us.... My peers and I are often told that we are the future leaders of America. We may be the future decision makers, but most of us aren't leaders. Our principal concern is becoming members of the American elite, with whatever compromises, concessions and conformity that requires.[22]

I think this Harvard undergrad is spot on. I certainly wouldn't be surprised if the pursuit of gold stars explains a lot of the behavior we see in elite colleges and universities. We can debate what we think about that, but it's emphatically *not* the behavior we should hope to see in our nation's judges.

If you plan to be faithful to the Constitution in *every* case, no matter how unpopular that may be, gold stars are not in the cards for you. But that's the job. Judges don't swear an oath to uphold the Constitution *part* of the time: We swear an oath to uphold the Constitution *all* of the time.

I'll use another sports analogy. You've heard of "fair-weather" fans. Well, if you're an originalist only when elites won't be upset with you—if you're an originalist only when it's easy—that's not principled judging. That's fair-weather originalism.

We're not binding ourselves to the text if we only follow it when people like the result. Originalism is either a matter of principle or just a talking point. Fair-weather originalism isn't originalism, because if you're not an originalist in every case, then you're really not an originalist at all.

Moreover, there's a perverse irony to fair-weather originalism. If you're a law nerd like me, then you might find debates about judicial methodology fascinating no matter what the underlying legal issue is. The first time I was assigned an opinion for our en banc court, we were divided 10–2–4. We spent 55 pages debating the meaning of Rule 54(b) of the Federal Rules of Civil Procedure. The legal issues we decided in that case are fascinating to absolutely no one—including me—and I wrote two separate opinions in the case.[23]

For millions of Americans, their passion for originalism is not some abstract, academic question of interpretive methodology. For millions of Americans, their passion for originalism comes from the fact that they like our Constitution: They like what it says, what it protects and shields against the ravages of the mob, and what it entrusts to the people and the democratic process to decide.

How tragically ironic it would be, then, to practice a form of originalism that governs every legal dispute under the sun—except the most important ones.

"Do Your Job—and Then Go Home"

So what should judges do when people boo? I have three thoughts.

First, learn to expect it. Judges should *expect* people to boo.

Criticism of judges is nothing new, and it's certainly not going anywhere. Thomas Jefferson once blasted the judiciary as a "subtle corps of sappers [and] miners constantly working underground to undermine the foundations of our confederated fabric." Teddy Roosevelt once said about Oliver Wendell Holmes that you "could carve out of a banana a Judge with more backbone than that!"

Criticism of judges is historical because it's natural. You can't tell people not to be upset with the outcome of a particular case, because you can't tell people not to feel what they feel.

I'm a big Stanford football fan. I've been to every Rose Bowl game Stanford has ever attended in my lifetime. So when I boo a ref—and yes, it's when, not if, I boo a ref—it's not because I have a deep philosophical disagreement with the underlying principles the ref is applying when he calls pass interference. I'm booing because I want Stanford to win!

I'd say that it's the God-given right of every red-blooded American to yell at refs, and I'd say the exact same thing about criticizing judges. Maybe this is just the former litigator in me, but if I'm feeling charitable, I might view criticism of judges as just another form of passionate, aggressive advocacy. There's even a term for it, and it happens to be another sports analogy. It's called "working the refs." On the other hand, under a less charitable view, one might view certain critics as nothing more than playground bullies—people who can't just rely on text or truth and instead have to resort to yelling and screaming to get their way.

But whether you take the charitable or uncharitable view, the lesson for judges is the same: As judges, it's our duty to do our jobs and ignore the booing of the crowd. If you're looking for gold stars, you're in the wrong business. You should become a judge for public service, not public applause, because if you do the job faithfully, you should expect to be either hated or ignored.

Moreover, there's another reason why judges should expect to be booed. It's not just because we live in a free country where people have the right to boo. It's because we live in a diverse country where people hold a wide range of views.

Some of the harshest critics of originalist judges also happen to hold some of the most extreme views in our country, and sometimes, they say the quiet part out loud. They call the Constitution "trash" "written by slavers."[24]

They celebrate the discrimination and disruption we see on law school campuses. They condemn religious conservatives as undeserving of respect.[25] They advocate treating people differently—even choosing who to put in prison—based on the color of their skin.[26]

Needless to say, I strongly disagree, but I mention it because it may explain a lot about what's being said. If you don't like color-blindness, then of course you won't like color-blind judges. If you think our Constitution is "trash," then of course you'll trash people who follow it faithfully. If you don't like our Constitution, then you won't like originalism.

My second thought is this: You should not only *expect* booing—you should *get used* to it, because it's not going away anytime soon.

For too long, we've sent the message that to achieve your desired outcomes, you don't have to persuade; you can just pressure and punish. We've told the next generation that you can win the argument without actually winning the argument. And it doesn't matter if you prove time and time again that criticisms won't affect you. When it comes to cancel culture, the intended audience isn't the target of the attacks; it's everyone else.

So get used to it. The good news is that you *can* get used to it. I'll use an analogy that comes not from sports, but from science.

Biosphere 2 is a science research facility in Arizona. It's the largest fully enclosed ecological system ever created. Scientists have used it to study a number of natural phenomena.

One thing they learned is that, in a completely enclosed environment, trees grow quickly, but then they start to collapse. They discovered that this idyllic environment is good for trees at first, but then it can spell disaster. That's because, inside an enclosed facility, there is no wind, so trees don't get the chance to learn how to stand against the wind. They don't develop the natural strength they'll need to prosper. They never develop what's known as "stress wood."

A life without stress may sound great at first, but trees actually need stress to be strong. They need stress to learn how to survive the harsh weather conditions they'll encounter later in life.[27]

Stress wood is ultimately the only cure for gold star syndrome. It inoculates you to harsh criticism. It's a natural immunity that you can only build up over time both before and after you take the bench.

If you're going to do this job, stress is guaranteed. Criticism is unavoidable. You just have to learn not to worry about it. My advice? Do what refs do. Do your job—and then go home. Have a wonderful, fulfilling personal life. When you look in the mirror, you should see a mom, a dad, a husband, a wife. But if what you see in the mirror is a judge—if your whole life's purpose is to wear black robes—then maybe you shouldn't.

My third and final thought: Don't just expect harsh criticism. Don't just get used to it. You should also get comfortable with it.

We're all extraordinarily blessed to live in this great country, and some of us are fortunate to play at least a small role in helping to lead this country forward, whether we're judges or leading practitioners or influential legal scholars. But that privilege comes at a cost.

To use an analogy, being faithful to the Constitution is like being a faithful Christian. As the Bible teaches, Christians should expect to be criticized. I'll read a few verses from Chapter 4 of Peter's First Epistle:

> Dear friends, do not be surprised at the fiery ordeal that has come on you to test you, as though something strange were happening to you. But rejoice inasmuch as you participate in the sufferings of Christ, so that you may be overjoyed when his glory is revealed. If you are insulted because of the name of Christ, you are blessed, for the Spirit of glory and of God rests on you.

Chief Justice Roberts analogizes judges to umpires, but if we have to use a sports metaphor, I've got another idea. I mentioned that I like football. I'm also a big fan of tennis—and, lately, pickleball. The U.S. Open is one of my favorite tennis tournaments. My post-college graduation vacation included a trip to New York to watch my first U.S. Open in person.

The final rounds at the U.S. Open are held at Arthur Ashe Stadium. Those who have had the honor of competing there call it the most intense, stressful, pressure-packed stadium you'll ever play in. It's not just that the stakes are enormous. The stadium is also physically daunting. It's been described as "unapologetically large and loud" like its host city.

Every player who competes on that court must first walk by a plaque that prominently displays four important words: "Pressure Is a Privilege." Those same four words are also what judges should keep in mind every time we step onto the court.

Four days before she won the women's final last month, a reporter asked Coco Gauff how she handles the pressures of being a professional tennis player as a 19-year-old. Her response should resonate with every member of our profession—lawyers as well as judges. Here's what she said:

> I think it's just putting my life into perspective.... [T]here are people struggling to feed their families, people who don't know where their next meal is going to come from.... That's real pressure, that's real hardship, that's real life. I'm in a very privileged position. I'm getting paid to do what I love and getting support to do what I love.... [T]here are millions of people who probably want to be in

> this position.... So...I should enjoy this. I'm having so much fun doing it. And I shouldn't think about the results. I'm living a lucky life and I'm so blessed.[28]

To that, I say: Amen.

Two Things to Remember

Stress is inevitable in our profession, but pressure is a privilege.

As judges, we should always remember two things: There are countless law students, lawyers, and fellow Americans who would do anything to trade places with us, and no one forced you to become a judge. You agreed to become a judge. Some people even lobby and campaign for it, and you can quit anytime you want. It's life tenure, not a life sentence, so you should only do it if you're ready and willing to accept what it entails.

It is my profound privilege to serve on the United States Court of Appeals for the Fifth Circuit, and it is my profound privilege to deliver this year's Story Lecture. Thank you for listening.

The Honorable James C. Ho is a Judge on the U.S. Court of Appeals for the Fifth Circuit. **John G. Malcolm** is Vice President of the Institute for Constitutional Government, Director of the Edwin Meese III Center for Legal and Judicial Studies and the B. Kenneth Simon Center for American Studies, and Gilbertson Lindberg Senior Legal Fellow at The Heritage Foundation.

Endnotes

1. Steven J. Duffield & James C. Ho, *The Illegal Appointment of Bill Lann Lee*, 2 Tex. Rev. L. & Pol. 335 (1998).
2. Edwin Meese III & James C. Ho, *Reagan's Legal Revolutionary*, 3 Green Bag 2d 193 (2000).
3. *See*, *e.g.*, The Federalist Nos. 2–4, 6, 11.
4. *See*, *e.g.*, Brutus, Essay I, *reprinted in* The Anti-Federalist Papers and the Constitutional Convention Debates 282, 288, 290 (Ralph Ketcham ed., Signet Classics 2003).
5. *See*, *e.g.*, Nate Silver, *Free Speech Is in Trouble*, Silver Bulletin, Nov. 2, 2023, *available at* https://www.natesilver.net/p/free-speech-is-in-trouble.
6. *See* John Villasenor, *Views Among College Students Regarding the First Amendment: Results from a New Survey*, Brookings Institution, Sept. 18, 2017, *available at* https://www.brookings.edu/articles/views-among-college-students-regarding-the-first-amendment-results-from-a-new-survey/.
7. *See* Emma Camp, *Two-Thirds of College Students Think Shouting Down a Public Speaker Can Be Acceptable*, Reason, Sep. 6, 2023, *available at* https://reason.com/2023/09/06/two-thirds-of-college-students-think-shouting-down-a-public-speaker-can-be-acceptable/.
8. *See* press release, Buckley Institute, Buckley Program Releases Eighth Annual College Student Survey (Oct. 25, 2022), *available at* https://buckleyinstitute.com/buckley-program-releases-eighth-annual-college-student-survey/.
9. *See*, *e.g.*, Silver, *supra* note 5 ("[T]here's a big gap between the liberal students and the conservative students. The conservatives are actually quite consistent, with roughly 60 percent support for both liberal and conservative speakers. The liberal students have a relatively high tolerance for liberal speakers, but little tolerance for conservative ones.").
10. *See*, *e.g.*, Bari Weiss, *You Are the Last Line of Defense*, Free Press, Nov. 13, 2023, *available at* https://www.thefp.com/p/you-are-the-last-line-of-defense ("For certain students, kid gloves. For others, the maw of whatever hate their classmates and professors can think of. The universities play favorites based on the speech they prefer, and the racial group hierarchies they've established. It's a nasty game and they need to be called to account for it."); *see also* Aaron Sibarium, *Law Students for Hamas*, Free Press, Nov. 10, 2023, *available at* https://www.thefp.com/p/yale-law-students-for-hamas.
11. *See*, *e.g.*, Silver, *supra* note 5 ("[A] lot of university presidents have expressed a conveniently-timed, newfound commitment to free expression that didn't match their previous behavior.... [I]f I were one of those donors, I'd say 'great, and now we're going to hold you to it. The next time you stray from your commitment to free speech—particularly when it comes to students or faculty who express conservative or centrist viewpoints—we're going nuclear.'").
12. *See* Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. Mag., Oct. 4, 2013, *available at* https://nymag.com/news/features/antonin-scalia-2013-10/; Clarence Thomas, *Be Not Afraid*, Am. Enterprise Inst., Feb. 13, 2001, *available at* https://www.aei.org/research-products/speech/be-not-afraid/; Ariane De Vogue, *Justice Ginsburg Speaks About Gender Equality*, ABC News, Nov. 18, 2011, *available at* https://abcnews.go.com/blogs/politics/2011/11/justice-ginsburg-speaks-about-gender-equality; *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010); press release, Office of Senator Dock Durbin, Durbin Questions Judge Ketanji Brown Jackson on Her Judicial Philosophy During Second Day of Her Nomination Hearing to the Supreme Court (Mar. 22, 2022), *available at* https://www.durbin.senate.gov/newsroom/press-releases/durbin-questions-judge-ketanji-brown-jackson-on-her-judicial-philosophy-during-second-day-of-her-nomination-hearing-to-the-supreme-court.
13. 600 U.S. 66 (2023).
14. Victoria F. Nourse, *The Supreme Court's Blindness to Gender Violence*, Ms. Magazine, Sep. 25, 2023, *available at* https://msmagazine.com/2023/09/25/supreme-court-gender-violence-women-counterman-rahimi/. *See also* Mary Anne Franks, *How Stalking Became Free Speech: Counterman v. Colorado and the Supreme Court's Continuing War on Women*, Geo. Wash. L. Rev. On the Docket, July 28, 2023, *available at* https://www.gwlr.org/how-stalking-became-free-speech-counterman-v-colorado-and-the-supreme-courts-continuing-war-on-women/#:~:text=Counterman%20was%20convicted%20under%20a,law%20explicitly%20requires%20that%20the ("[O]ne of the most devastating, unprincipled, and dangerous decisions handed down by the Supreme Court this term—a decision that jeopardizes women's rights to speak, to associate, to work, and to live—was...an alliance of the entire liberal wing with the majority of the conservatives.... Justice Kagan's Counterman majority opinion...invests the most antisocial, entitled, dangerous forms of behavior with the greatest constitutional protection to the detriment of the most vulnerable members of society.").
15. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005).
16. Tobias J. Moskowitz & L. Jon Wertheim, Scorecasting: The Hidden Influences Behind How Sports Are Played and Games Are Won (2011).
17. *Id.* at 157, 159.
18. *Id.* at 163–64.
19. *Id.* at 136–67.
20. *Id.* at 165.

21. *Empty Stadiums Have Shrunk Football Teams' Home Advantage*, Economist, July 25, 2020, *available at* https://www.economist.com/graphic-detail/2020/07/25/empty-stadiums-have-shrunk-football-teams-home-advantage.
22. Julie Hartman, *Harvard Students Are Covid Sheep*, Wall St. J., Feb. 22, 2022, *available at* https://www.wsj.com/articles/harvard-students-covid-credentials-university-college-campus-dorms-masks-gatherings-remote-learning-vaccine-booster-mandates-11645541474.
23. Williams v. Taylor-Seidenbach, Inc., 958 F.3d 341 (5th Cir. 2020) (en banc).
24. Isaac Schorr, *Nation Writer Labels the Constitution "Trash,"* Nat'l Rev., Mar. 4, 2022, *available at* https://www.nationalreview.com/news/nation-writer-labels-the-constitution-trash/.
25. Elie Mystal, *Protesting an Anti-Trans Trump Judge Isn't Disrespectful, It's American*, Nation, Mar. 15, 2023, *available at* https://www.thenation.com/article/politics/protesting-anti-trans-judge-kyle-duncan-is-american/; *see also* Joe Patrice, *Crybaby Law Professor Quits Twitter in a Huff over UChicago Immigration Slur Debacle*, Above the Law, Feb. 22, 2018, *available at* https://abovethelaw.com/2018/02/crybaby-law-professor-quits-twitter-in-a-huff-over-uchicago-immigration-slur-debacle/ ("Maybe conservatives are marginalized on campus, but marginalization isn't always bad.").
26. Elie Mystal, *Here's How Black People Could Use Jury Nullification to Break the Justice System*, Above the Law, Dec. 7, 2016, *available at* https://abovethelaw.com/2016/12/heres-how-black-people-could-use-jury-nullification-to-break-the-justice-system/.
27. Abigail Alling & Mark Nelson, Life Under Glass: The Inside Story of Biosphere 2, at 123 (Deborah Parrish Snyder et al. eds., 1993); Mark Nelson, Pushing Our Limits: Insights from Biosphere 2, at 128, 159 (2018).
28. Matias Grez, *How Putting Her Life "into Perspective" Helped Coco Gauff Handle the Pressure During US Open Run*, CNN, Sept. 7, 2023, *available at* https://www.cnn.com/2023/09/07/tennis/coco-gauff-karolina-muchova-us-open-spt-intl/index.html; *see also* https://m.youtube.com/watch?v=FFoZm8bGWjM.