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Foreword

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FOREWORD

HON. ROY K. ALTMAN*

The federal judiciary is no stranger to crisis. Throughout American history, we've repeatedly asked our federal courts—in times of war and national emergency—to find, and sometimes to draw, the evanescent line that marks the outer limits of governmental power. From the Whiskey Rebellion to the Civil War, from World War II to the COVID-19 pandemic, federal judges have had to reconcile the powerful—and sometimes competing—demands of safety and freedom. Some of the Supreme Court's most well-known decisions, in fact, were forged in just this kind of crisis.¹

And there's a tendency to think of the judge's role in these emergencies as being purely decisional. Which is to say that we like to conceive of the judiciary as being *mostly* reactive—inoffensive even. In this standard historical reconstruction, the executive official—faced with exigency—sets the litigative process in motion by acting boldly (and perhaps extra-constitutionally). In response, the court reviews the parties' submissions, coldly interprets the law and the facts, and renders its judgment—always at a distance, detached from (and unaffected by) the emergency itself.² And it's this

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¹ See, e.g., *The Prize Cases*, 67 U.S. (2 Black) 635 (1862); *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934); *Ex parte Quirin*, 317 U.S. 1 (1942); *Korematsu v. United States*, 323 U.S. 214 (1944); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Boumediene v. Bush*, 553 U.S. 723 (2008).

² See Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 *YALE L.J.* 1011, 1029–30 (2003) (“The executive branch assumes a leading role in countering the crisis, with the other two branches pushed aside (whether of their own volition or not).”). Indeed, scholars sometimes criticize courts for being *too* deferential in these emergencies. See, e.g., CHRISTOPHER N. MAY, *IN THE NAME OF WAR: JUDICIAL REVIEW AND THE WAR POWERS SINCE 1918* 261–64, 268 (1989) (describing courts as giving “[r]itualistic

dispassionate judgment—often in the form of a written opinion—that later generations are left to digest, discuss, and debate.

We owe much of this perception to Alexander Hamilton’s oft-cited description of judges as having “neither FORCE nor WILL, but merely judgment.”³ For the most part—and in normal circumstances—Hamilton was right: The Constitution *does* invest federal judges with jurisdiction *only* over “Cases” and “Controversies,”⁴ and we judges *do* “zealously” guard the boundaries of our narrowly-circumscribed jurisdiction.⁵ Hamilton was also right that the core function of federal judges is to sit in judgment—guarding our constitutional rights—as the elected branches address the more-immediate challenges of the day.

But, in moments of crisis, this well-accepted view of The Least Dangerous Branch⁶ is partially incomplete *precisely* because it tends to undervalue the many ways in which judges, as human beings, and courthouses, as tangible structures, are *physically* affected by the events around them. The standard narrative thus leads us to overlook how, and to what extent, the court’s operations *might also* be disrupted by national emergencies—disruptions that, in and of themselves, then push up against (perhaps even impinge upon) our rights and liberties. The point is that the judiciary isn’t a two-dimensional organization—a collection of law-breathing automatons whose work product exists only on paper. It, to the contrary, functions very much in the real world—and its decisions are often a product of real-world exigencies. We should always remember, in short, that courts aren’t simply *reactive* institutions—responding to whatever actions the other branches might take. They, instead, must often interpose themselves between the People and their government on the one hand, while they govern (and simultaneously constrain) on the other.

[a]pproval” to governmental emergency measures and suggesting that courts “steer a middle course and defer review until the emergency has abated”).

³ FEDERALIST No. 78.

⁴ U.S. CONST. art. III, § 2.

⁵ *Smith v. GTE Corp.*, 236 F.3d 1292, 1299 (11th Cir. 2001) (“[B]ecause a federal court is powerless to act beyond its statutory grant of subject matter jurisdiction, a court must zealously insure that jurisdiction exists over a case, and should itself raise the question of subject matter jurisdiction at any point in the litigation where a doubt about jurisdiction arises.”).

⁶ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

With due respect to Colonel Hamilton, in other words, judging often requires strength *and* will—not *merely* judgment.

This has been true since the Founding—when the judiciary was in its infancy. The First Judiciary Act of 1789,⁷ in fact, required Supreme Court justices to “ride circuit”—literally, to travel around the country (by horse or on foot) to preside over and to resolve sometimes-minor disputes. Modeled after the old English practice, this process of riding circuit was *physically* taxing, particularly at a time when travel was slow and precarious.⁸ In 1799, Justice James Iredell—worn down by his circuit duties—died at just forty-eight years old.⁹ Other early justices, including our first Chief Justice, John Jay, resigned (in part) because of the job’s *physical* burdens—and some candidates even turned down appointments for similar reasons.¹⁰ The grueling, *physical* aspect of the job thus shaped the nascent Supreme Court and, as we’re about to see, played a key role in the outcome of some early crises.

Take, for instance, the Whiskey Rebellion of 1794. President Washington—most of us know—suppressed the violent tax protests that had broken out in rural Pennsylvania that year by leading 13,000 militiamen (many of them veterans of the Revolution) directly into the mob, disbanding it, and rounding up its leaders. But few of us remember that Washington didn’t act under his Article II powers alone. He also invoked the Militia Act of 1792, which required, as a precondition to the use of force, a federal judge to certify that the rebellion *actually* constituted an emergency.¹¹ Seeking just such a certification, Washington petitioned the Supreme Court, and the case landed on the desk of Justice James Wilson, whose circuit duties happened to place him in Pennsylvania that week and who had taken on most of the Court’s administrative responsibilities when

⁷ 1789 Act § 4, 1 Stat. 73, 74–75.

⁸ Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1765 (2003) (“The Southern Circuit required long trips through rough, unpopulated, and even unknown terrain at times in unpredictably bad nasty weather with lodgings uncertain and often unpleasant.” (citations omitted)).

⁹ Robert M. Ireland, *Iredell, James*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 509 (Kermit L. Hall ed., 2d ed. 2005).

¹⁰ BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 18–19 (1993).

¹¹ See Act of May 2, 1792, ch. 28, § 2, 1 Stat. 264, 264.

the capital was moved to Philadelphia in 1791.¹² Washington had appointed Wilson just five years earlier.¹³ But, while Wilson was a trusted Federalist, he didn't rubber stamp the certification. Instead, consistent with his duties, Wilson demanded *evidence* from the administration, which responded by sending Alexander Hamilton—then Secretary of the Treasury—to secure the testimony of at least one army colonel who was stationed nearby.¹⁴ It was only after the colonel testified before the Court that Justice Wilson certified the rebellion and authorized Washington to call the militia into service. Justice Wilson's *physical* presence in Pennsylvania when the rebellion broke out, in other words, was essential to the speedy administration of justice.

A generation later, in the turbulent early days of the Civil War, President Lincoln wanted to secure the movement of Union troops through Maryland—a critical border state—towards the capital. But Maryland had been teetering on the edge of secession after some pro-Confederate mobs had attacked a regiment of Union soldiers and looted some property in Baltimore. So, Lincoln took a drastic step: He authorized General Winfield Scott to suspend the ancient writ of habeas corpus.¹⁵ With the writ suspended, federal troops seized a confederate sympathizer named John Merryman, who (it was alleged) had participated in the destruction of federal property. Merryman was detained at Fort McHenry¹⁶—the same Fort McHenry at which, forty-three years earlier, Francis Scott Key had composed the lyrics of our Star Spangled Banner. Here, again, the *physical* realities on the ground—in this case, the *physical* limitations the war imposed on the Court—played a critical role in the leadup to a landmark Supreme Court decision.

Merryman was a wealthy and well-connected southerner whose lawyers petitioned Chief Justice Taney—then presiding as circuit

¹² Maeva Marcus, *Wilson as a Justice*, 17 GEO. J.L. & PUB. POL'Y 147, 164 (2019).

¹³ Todd E. Pettys, *Choosing A Chief Justice: Presidential Prerogative or A Job for the Court?*, 22 J.L. & POL. 231, 233 (2006).

¹⁴ Richard H. Kohn, *The Washington Administration's Decision to Crush the Whiskey Rebellion*, 59 J. AM. HIST. 567, 572 & n.23 (1972).

¹⁵ See Seth Barrett Tillman, *Ex Parte Merryman: Myth, History, and Scholarship*, 224 MIL. L. REV. 481, 485 (2016).

¹⁶ See *id.* at 487.

judge—for immediate release.¹⁷ In response, Taney issued a writ of attachment, by which he ordered General George Cadwalader, the Union commander at Fort McHenry, to produce Merryman the next day. But, rather than comply with the Chief Justice’s writ, Cadwalader sent a representative—who arrived *without* Merryman. Taney held General Cadwalader in contempt and sent a U.S. Marshal to seize Merryman. But there was a heavy Union military presence at Fort McHenry, which prevented the Marshal from reaching his target. Frustrated, Taney decided to write a now-famous opinion—known to history as *Ex parte Merryman*—holding Lincoln’s suspension of the writ unconstitutional.¹⁸

Examples like this abound. In 1866, shortly after the end of the Civil War, the Supreme Court reversed the conviction and death sentence of Lamden P. Milligan, a “copperhead”¹⁹ who had tried to subvert the war effort. Milligan had been tried and sentenced to death—not by a judge or jury, but by a military tribunal. In another seminal case, *Ex parte Milligan*, the Court unanimously held that, “where the courts are open and their process unobstructed,” the Constitution prohibited the federal government from trying civilians in military tribunals.²⁰ Towards the end of its opinion, though, the Court presaged a time when the justice system’s *physical* limitations *might* permit the use of military tribunals. In the event of “foreign invasion or civil war,” Justice David Davis wrote, the courts may “actually [be] closed,” rendering it “impossible to administer criminal justice according to law.”²¹ In such a case, the Court suggested, martial law might be permissible.

¹⁷ There’s some dispute about whether Merryman’s lawyers delivered the petition to Justice Taney at his home—in which case they would have served him in his individual capacity—or whether they petitioned the circuit court, which then assigned the case to Taney. *See id.* at 488.

¹⁸ *See Ex parte Merryman*, 17 F. Cas. 144, 148 (1861). In an interesting post-script, Taney ordered the clerk of the Court to transmit a copy of his opinion directly to Lincoln, where it would “remain for that high officer, in fulfilment of his constitutional obligation to ‘take care that the laws be faithfully executed,’ to determine what measures he will take to cause the civil process of the United States to be respected and enforced.” *Id.* at 153. Merryman ultimately named one of his sons after Taney.

¹⁹ A northern Democrat who favored settlement with the Confederacy.

²⁰ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866).

²¹ *See id.* at 127.

Of course, until the COVID-19 pandemic, *Milligan*'s warning about a hypothetical day in which courts might have to shut down always seemed unlikely. In March 2020, though, all of that changed. On March 11, 2020, with infections skyrocketing, the World Health Organization declared the COVID-19 outbreak a global pandemic.²² Two days later, the President of the United States declared a national emergency. That same day, K. Michael Moore, then-Chief Judge of our Court, entered the first in a series of administrative orders that continued jury trials in the Southern District of Florida "in order to protect the public health[] and . . . to reduce the size of public gatherings and reduce necessary travel."²³ About two weeks later, Chief Judge Moore suspended all grand jury sessions in the Southern District of Florida²⁴—a moratorium he ultimately extended until November 17, 2020.²⁵ For the first time in 230 years, courts around the country were experiencing the kinds of closures Justice Davis had only mused about in *Milligan*.

Over the last two years, the federal government has taken several *other* actions to slow the spread of COVID-19 and to mitigate its worst effects. Those executive decisions have led to dozens of lawsuits—most of which have cast the courts in their now-familiar role of impartial arbiters over the propriety of governmental action. In December 2021, for example, a divided panel of the Eleventh Circuit refused to stay pending appeal a rule promulgated by the Department of Health and Human Services, which required healthcare workers to be vaccinated against COVID-19.²⁶ And the Eleventh Circuit is now considering the viability of a district court's

²² See Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 18, 2020) (noting the WHO's declaration).

²³ Our Court's administrative orders relating to the COVID-19 pandemic can be found at <https://www.flsd.uscourts.gov/administrative-orders-relating-covid-19>.

²⁴ See Order Concerning Grand Jury Sessions, Administrative Order 2020-22 (S.D. Fla. Mar. 26, 2020).

²⁵ See *In re: Partial Sequestration of Grand Jurors*, Administrative Order 2020-87 (S.D. Fla. Nov. 16, 2020) (resuming grand jury proceedings on November 17, 2020).

²⁶ *Florida v. Dep't of Health & Hum. Servs.*, 19 F.4th 1271 (11th Cir. 2021).

nationwide injunction that had the practical effect of staying the implementation of a vaccination mandate for government contractors.²⁷

But court closures and pandemic safety measures have raised a host of other, unique legal issues that (again) raise questions about the extent to which the courts' *physical* operations affect litigative outcomes. One of the most interesting of these involves the juxtaposition between the five-year statute of limitations that governs most federal crimes (on the one hand)²⁸ and our Court's suspension of grand-jury proceedings (on the other). The problem these cases present is this: While our grand-jury moratorium was still in effect, the Government faced a Hobson's choice when it came to defendants who had committed their crimes *almost* five years earlier. It could *either* allow the five-year statute of limitations to expire (which would mean absolving these defendants of their crimes) *or* it could commence a criminal prosecution before the window closed by *instituting*²⁹ an information—with the understanding that, as soon as the grand jurors returned, it would dismiss the information and get its indictment. Unsurprisingly, the Government chose the latter course: It charged these defendants by information and, once the grand jury reconvened, indicted them. But (and here's the rub) some of these defendants never waived their right to have their cases presented to a grand jury—a right enshrined in *both* the Fifth Amendment to the U.S. Constitution³⁰ *and* Rule 7 of the Federal Rules of Criminal Procedure.³¹ This wouldn't be such a big deal—except that, while these informations were pending (and before our Court

²⁷ *Georgia v. President of the U.S.*, No. 1:21-cv-163, 2021 WL 5779939 (S.D. Ga. Dec. 7, 2021), *appeal filed*, No. 21-14269 (11th Cir. Dec. 10, 2021).

²⁸ 18 U.S.C. § 3282(a).

²⁹ That's the word Congress chose in the Crimes Act of 1790. *See* ch. 9, § 32, 1 Stat. 112, 119 (“[N]or shall any person be prosecuted, tried or punished for any offence, not capital, nor any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or *instituted* within two years from the time of committing the offence.” (emphasis added)).

³⁰ U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury[.]”).

³¹ Rule 7 allows defendants to waive prosecution by indictment—but only if they do so “in open court” and only after they’ve been “advised of the nature of the charge and of [their] rights.” FED. R. CRIM. P. 7.

brought the grand jurors back), the five-year statutes of limitations on many of these crimes expired. Contending that the Government worked a clever—if illegal—end-run around their rights, some of these defendants moved to dismiss their indictments. And their motions have split our courts: Judge Ruiz and I came out one way, and Judge Middlebrooks went the other.³² The question is now pending before the Eleventh Circuit, which heard arguments on Judge Middlebrooks's case late last year.³³

The pandemic has presented other practical questions, too: Will we see, as we have in some state courts, federal criminal trials by Zoom?³⁴ Would a Zoom cross-examination satisfy the Confrontation Clause if it's conducted over the defendant's objection? Would vaccine requirements for venire members impinge on the litigants' right to select jurors from a representative sample of the community? And would a judge's decision to close his courtroom to unvaccinated spectators violate a defendant's, or the community's, rights to a public trial? As courts continue to struggle with the after-effects of the pandemic, these questions, and others like them, will need to be resolved.

Fortunately, as of this writing, death rates have plummeted, and the Center for Disease Control has begun to relax most of its safety recommendations. Schools are ending mask mandates, and workers are returning to their offices in large numbers. Here at the Wilkie D. Ferguson Courthouse in downtown Miami, familiar sounds are once again echoing through the halls: of lawyers conversing in the rotunda; of jurors shuffling into courtrooms; of FBI agents pushing boxes of evidence in for trial. Even as our courthouses return to full strength, however, the harrowing events of the last two years should remind us of the institutional challenges courts might face in future exigencies. In preparing for these inevitable crises—from disease, environmental catastrophes, or cyberattacks—we ought to think

³² *United States v. Sanfilippo*, 2021 WL 5414945 (S.D. Fla. 2021) (Altman, J.); *United States v. Rosecan*, 528 F. Supp. 3d 1289, 1292–93 (S.D. Fla. 2021) (Ruiz, J.); *United States v. B.G.G.*, No. 20-cr-80063-DMM (S.D. Fla. Jan. 1, 2021) (Middlebrooks, J.), ECF No. 19.

³³ *See United States v. B.G.G.*, No. 21-10165 (11th Cir. appeal filed Jan. 14, 2021).

³⁴ *See, e.g., Trial by Zoom: Virtual Trials in the Time of COVID-19*, JD SUPRA (Feb. 11, 2021), <https://www.jdsupra.com/legalnews/trial-by-zoom-virtual-trials-in-the-8191722/>.

more deeply, not only (as we often do) about the interrelationship between executive action and civil liberties, but also about *how* a court functions during an emergency and about the extent to which the mechanics of judicial operations can influence litigation outcomes.

In this Eleventh Circuit Issue, the *University of Miami Law Review* has collected a series of thought-provoking articles, two of which address some of the pandemic problems we've been highlighting here. In *Hiding in Plain Language: A Solution to the Pandemic Riddle of a Suspended Grand Jury, an Expiring Statute of Limitations, and the Fifth Amendment*, Nicole Mariani—who argued the *B.G.G.* case in the Eleventh Circuit—examines the text of the Crimes Act of 1790, the case law interpreting it, and the statute's structure and purpose and concludes that, through a savings clause in 18 U.S.C. § 3288, Congress expressly authorized the government to prosecute certain criminal defendants whose statutes of limitations expired during the pandemic. In *Florida's Judicial Ethics Rules: History, Text, and Use*, Professor Robert M. Jarvis offers a useful guide on the codes of conduct that govern Florida's state and federal judges. And, in *Maritime Magic: How Cruise Lines Can Avoid State Law Compliance Through Passenger Contracts*, Cameron Chuback addresses the merits of a Florida statute—struck down by a member of our Court—that sought to prohibit cruise lines from requiring passengers to show proof of vaccination.³⁵ I hope you'll enjoy these pieces as much as I have.

³⁵ *Norwegian Cruise Line Holdings, Ltd. v. Rivkees*, 553 F. Supp. 3d 1143 (S.D. Fla. 2021) (Williams, J.).