

A JURISPRUDENTIAL APPROACH TOWARDS JUDICIAL INDEPENDENCE AND ACCOUNTABILITY AND THE INTERBRANCH RELATION BETWEEN THEM: TWO SIDES OF A SAME COIN

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INTRODUCTION

Recent years have witnessed attacks on the courts, federal and state, that have been notable for both their frequency and their stridency.⁹ Many of these attacks have been part of strategies calculated to create and sustain an impression of judges that makes courts fodder for electoral politics. The strategies reflect a theory of judicial agency, the idea that judges are a means to an end, and that it is appropriate to pursue chosen ends through the selection of judges who are committed or will commit to them in advance. The architects of these strategies seek to create the impression not only that courts are part of the political system, but also that they and the judges who sit upon them are part of ordinary politics.

At the federal level, pursuit of these strategies prompts politicians to curry favor by promising to hold courts and judges accountable: staffing courts (or ensuring that they are staffed) with reliable judges, monitoring them through “oversight,” and, when they stray, reining them in through the instruments of politics—ordinary or extraordinary (impeachment). At both the federal and state levels, these strategies enable interest groups to wield influence by framing judicial selection in terms of the supposed causal influence of a vote in favor of or against a judicial nominee or candidate on results in high salience cases, such as those involving the death penalty or abortion. Proceeding from this view of the causes of our current malaise in interbranch relations affecting the judiciary, I seek, in Part I, to make precise the nature and extent of the threat that they pose to judicial independence. In Part II, I turn to how, in the conduct of interbranch relations, the judiciary should respond to the impulses and incentives, both legitimate and illegitimate that have brought us to this unhappy point in interbranch relations. The insight developed there—that successful interbranch relations require the institutional judiciary to avoid the attitudes and techniques of contemporary politics, but not to avoid politics—leads me finally to consider judicial politics more generally in Part III.

In pursuing these goals, I draw on (without frequent citation to) my interdisciplinary work exploring judicial independence and judicial accountability and the implications for the future of theoretical and empirical research concerning interest groups and public knowledge of and attitudes toward courts.¹⁰ I also draw on

⁸ Student, Institute Of Law, Nirma University, Ahmedabad

⁹ See, *Infra* Text accompanying Notes 13, 57.

¹⁰ STEPHEN B. BURBANK, *alternative Career Resolution II: Changing The Tenure Of Supreme Court Justices*, 154 U. Pa. L. REV. 1511 (2006)

editorials written during my tenure as chair of the Editorial committee of the American Judicature Society and on work in which I have explored the writings and career of a distinguished federal judge, the late Richard Sheppard Arnold.¹¹ This research illustrates the critical role that judicial accountability, properly conceived, plays in judicial independence, and hence the critical role that politics of a certain sort must play in the work of courts and the judiciary if they are to continue to serve as the guardians of our fundamental rights and liberties.¹²

THE NATURE AND EXTENT OF THE THREAT

In order to understand the relationship between judicial independence and judicial accountability, and thereby gain the perspective necessary to evaluate the state of the relationship portended by current developments, it is useful to consider some of the fruits of recent interdisciplinary scholarship.

INDEPENDENCE AND ACCOUNTABILITY

Believing that discussions and debates about judicial independence had produced more heat than light, and that scholars in different disciplines had been talking past one another, in 2001, Barry Friedman and I convened a conference of some thirty prominent academics with backgrounds spanning the disciplines of law, economics, history, and political science to discuss what we knew about judicial independence. In a chapter of the book that emerged from the conference, and in a free-standing article, I sought to demonstrate that judicial independence is merely the other side of the coin from judicial accountability (that the two are not at war with each other but rather are complements); that neither is an end in itself but rather a means to an end (or variety of ends); that the relevant ends relate not primarily to individual judicial performance but rather to the performance of courts and court systems; and that there is no one ideal mix of independence and accountability but rather that the right mix depends upon the goals of those responsible for institutional architecture with respect to a particular court or court system.¹³

From these premises, one can derive a number of additional propositions that may be helpful in considering the relationship between judicial independence and judicial accountability and the role that interbranch

¹¹ STEPHEN B. BURBANK, *Judicial Accountability To The Past, Present, and Future: Precedent, Politics and Power*, 28 U. ARK. LITTLE ROCK L. REV. 19 (2005).

¹² Although Some Of The Landscape I Survey Includes Both The Federal and State Judiciaries, I Will Focus On Interbranch Relations Involving The Federal Judiciary and Congress. General accounts Of and Prescriptions about Interbranch Relations Risk The Weakness That Often Undermines General accounts Of and Prescriptions about Judicial Independence and Judicial accountability: They May Mask Particularities Of Different Institutional Designs That Reflect Different Social and Political aspirations.

¹³ STEPHEN B. BURBANK & BARRY FRIEDMAN, *Reconsidering Judicial Independence, In Judicial Independence at The Crossroads*, *Supra* Note 2, at 9

relations plays in maintaining the balance between them that a particular polity desires. First, judicial accountability has as many roles to play as does judicial independence. as a result, judicial accountability should serve to moderate what would otherwise be unacceptable decisional Independence (that is, decisions unchecked by law as generally understood or, in the case of inferior courts, by the prospect or reality of appellate review). In addition, judicial accountability should moderate other judicial behavior that is hostile to or inconsistent with the ability of courts to achieve the role or roles envisioned for them in the particular polity (for example, as to federal judges, “conduct prejudicial to the effective and expeditious administration of the business of the courts”).¹⁴

Second, just as independence must be conceived in relation to other actors (independence from whom or what?), so must accountability (accountability to whom or what?). as a result, judicial accountability should run to the public, including litigants whose disputes courts resolve, and who therefore have a legitimate interest in court proceedings that are open to the public and in judicial decisions that are accessible. Judicial accountability should also run to the people’s representatives, who appropriate the funds for the judiciary and whose laws the courts interpret and apply, and who therefore have a legitimate interest in ensuring that the judiciary has been responsible in spending the allotted funds and that, as interpreted and applied by the courts, public laws are functioning as intended. Finally, judicial accountability should run to courts and the judiciary as an institution, both because individual judicial independence exists primarily for the benefit of institutional independence and because appropriate intrabranch accountability is essential if potentially inappropriate interbranch accountability is to be avoided.¹⁵ In each instance, proper regard for the other side of the coin—that is, for judicial independence—requires that accountability not entail influence that is deemed to be undue.

INTERBRANCH RELATIONS

Recent scholarship has also brought sharply into focus the fact that formal protections of federal judicial independence pale in comparison with formal powers that might be deployed to control the federal courts and make them “accountable.” This scholarship, in particular the work of Charles Geyh,¹⁶ has thus made it clear that the traditional equilibrium between the federal judiciary and the other branches—what the organizers of this conference have called “our nation’s tradition of judicial independence”—owes its existence primarily to informal norms and customs. One such norm or custom is to eschew use of the

¹⁴ 28 U.S.C. § 351(a)

¹⁵ Editorial, *Separation Of Powers and Mutual Respect*, 87 JUDICATURE 200, 201 (2004)

¹⁶ CHARLES GARDNER GEYH, *WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA’S JUDICIAL SYSTEM* (2006)

impeachment process in response to judicial decisions that are unpopular. another is to eschew court packing as a means of ensuring decisions in accord with the preferences of the dominant coalition.

However difficult it may be to amend constitutions, and however much we may like to refer to a “constitutional law” of custom and practice, we know that customs, norms, and traditions can change. Neither the fact that periods of friction between the judiciary and the other branches have recurred throughout our history nor the fact that they have been succeeded by a return to normalcy is adequate grounds for confidence that the pattern will hold. Similarly, optimism that norms of interdependence between the Executive and Legislative branches can be restored provides little comfort. For, if I am correct about the dynamics leading to our current malaise, there is reason to fear a tipping point, a point of no return to the traditional equilibrium in interbranch relations affecting the judiciary.

The current poisonous condition of interbranch relations affecting the judiciary is in one sense unremarkable. For that condition reflects the state of contemporary politics in general, a defining characteristic of which has been a breakdown of traditional norms of interdependence.¹⁷ It is, however, remarkably dangerous for reasons that have to do not so much with the basic and enduring fragility of judicial independence as with its vulnerability to another defining characteristic of contemporary politics—namely, the debased notion of judicial accountability implicit in a view of judges as policy agents: if judges are policy agents, they should be “accountable” for their decisions in individual cases (or at least those involving issues of high salience).

One need not (and I do not) believe that elected politicians seek to maximize only their prospects for reelection to accept that, if those on the front lines of the current war on courts (that is, some interest groups, politicians, and journalists) succeeded in persuading the public to view judges as policy agents and courts as part of ordinary politics, it might be impossible to return to the status quo ante. For the informal norms and customs enabling the equilibrium we have enjoyed—a “tradition of judicial independence”—were forged and maintained in the shadow of the public’s support of the courts, support that was offered even in the face of unpopular decisions.

Richard arnold was a distinguished appellate judge and master of federal judicial administration in part because he was also a thoughtful student of politics in general and of judicial politics. Judge arnold did not write about judicial independence often, but his extrajudicial writings are filled with expressions of concern about judicial accountability. That is not because he thought that everyone understands what judicial

¹⁷ PETER M. SHANE, *When Inter-Branch Norms Break Down: Of arms-For-Hostages, “Orderly Shutdowns,” Presidential Impeachments, and Judicial “Coups,”* 12 CORNELL J.L. & PUB. POL’Y 503 (2003)

independence is and accepts that, defined as a judge might like to define it, it is an unalloyed good. He knew that if the federal judiciary is in fact, or is perceived to be, insufficiently accountable, it will lose the independence necessary for it to accomplish, if not what the architects of our system intended, what developing American constitutionalism requires.

Judge Arnold often stated that the judiciary must have the “continuing consent of the governed”¹⁸ in order to do its job. He also believed that, once a court has observed all jurisdictional limitations on its power, it must render and accept responsibility for a decision, however unpopular, that the law requires. From this perspective, his repeated expressions of concern about judicial accountability represented underlying anxiety about the prospects of judicial independence—namely, the continuing willingness or ability of the courts not, as he put it, to “pull [their] punches”¹⁹ when the law requires an unpopular decision.

Thus, I believe that Judge Arnold would have been relieved by the decisions of the federal courts in the Schiavo litigation,²⁰ whether or not he would have agreed with those decisions on the merits. And to the doyen of direct mailing, Richard Viguerie’s complaint that the decisions of those courts are “very dramatic proof of what we have been saying: that the judiciary is out of control,”²¹ I imagine Judge Arnold responding, “I certainly hope so.” I also imagine him wondering how long that will be true.

LEGITIMACY: PUBLIC PERCEPTIONS AND INTEREST GROUPS

We know that public support for the Supreme Court as an institution, irrespective of the decisions it was rendering in the 1930s—what political scientists call “diffuse support” and what I believe Judge Arnold was getting at in referring to the “continuing consent of the governed”—was consequential in the failure of President Roosevelt’s court-packing plan.²² There is reason to believe, however, that this deep well of diffuse support, which federal courts have traditionally been able to draw upon when making unpopular decisions,²³ might not survive the excrescences of contemporary politics regarding the judiciary, were they to persist.

¹⁸ RICHARD S. ARNOLD, *Judges and The Public*, LITIG., Summer 1983, at 5

¹⁹ *Id.* at 59

²⁰ *Schindler V. Schiavo*, 357 F. Supp. 2d 1378 (M.D. Fla.),

²¹ CARL HULSE & DAVID B. KIRKPATRICK, *Casting angry Eye On Courts: Conservatives Prime For Bench-Clearing Brawl In Congress*, N.Y. TIMES, Mar. 23, 2005, at A15

²² BARRY CUSHMAN, *Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change In The 1930s*, 50 BUFF. L. REV. 7, 67–74 (2002)

²³ HERBERT M. KRITZER, *The American Public’s assessment Of The Rehnquist Court*, 89 JUDICATURE 168, 172 (2005) (Revealing That Support For The Court By Democrats and Independents Did Not Change Significantly after The *Bush V. Gore* 531 U.S. 98 (2000) Decision)

Research suggests that diffuse support is linked to legitimizing messages about the courts, such as those that highlight the role of precedent and the rule-of-law ideal,²⁴ and that it is adversely affected by delegitimizing messages, such as those that frame court decisions simply in terms of results (for example, the message that *Bush v. Gore* decided the 2000 election).²⁵ We also know that most members of the public acquire whatever information they have about courts from the mass media and that even the normally inattentive public may pay attention to cases that are highly salient in personal terms (for example, cases dealing with issues such as race or religion),²⁶ receive extensive and prolonged media coverage, or are perceived to have a direct relationship to an individual's "community."²⁷

another body of research indicates that interest groups are here to stay in the politics of judicial selection, federal and state; that they thrive on conflict as a means to energize both their patrons and their members; and that they employ a variety of tactics to convey their messages, from lobbying to direct communications with their members to indirect communications through the mass media.²⁸ although some groups pitch their messages concerning judicial selection in terms of factors not directly related to results in cases (such as partisanship or general ideology), others see advantage in framing choices precisely in terms of the supposed effect of individual selection decisions on precedent concerning highly salient issues (for example, the assertion that voting for this nominee will lead to the overruling of *Roe v. Wade*).²⁹

Given what we know about public knowledge of and attitudes toward courts and about the incentives and tactics of the interest groups that are involved in judicial selection, there is reason to fear that the distinction between support for courts irrespective of the decisions they make ("diffuse support") and support depending on those decisions ("specific support") will disappear. If that were to occur, the people would ask of the judiciary not, "What does the law require?" but rather, "What have you done for me lately?" at least in systems where they lacked the ability to express their preferences directly (that is, by voting in an election), they would expect elected officials to help them secure the desired results by holding courts and judges "accountable" when they failed to produce the desired results. Politicians whose strategies had encouraged

²⁴ JAMES L. GIBSON Et al., *On The Legitimacy Of National High Courts*, 92 AM. POL. SCI. REV. 343 (1998); See also JAMES L. GIBSON Et al., *The Supreme Court and The U.S. Presidential Election Of 2000: Wounds, Self-Inflicted Or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 553–56 (2003) (Discussing The Framing Effect Whereby Unpopular Decisions are Cushioned By General Views about The Court and The Rule Of Law)

²⁵ STEPHEN P. NICHOLSON & ROBERT M. HOWARD, *Framing Support For The Supreme Court In The aftermath Of Bush V. Gore*, 65 J. POLITICS 676 (2003).

²⁶ WALTER F. MURPHY & JOSEPH TANENHAUS, *Public Opinion and The United States Supreme Court: Mapping Of Some Prerequisites For Court Legitimation Of Regime Changes*, 2 LAW & SOC'Y REV. 357, 362 (1968)

²⁷ The Concept Of "Community" May Be Relevant For These Purposes In Ideological as Well as Geographical Terms. See VALERIE J. HOESKSTRA, *The Supreme Court and Local Public Opinion*, 94 AM. POL. SCI. REV. 89, 97–98 (2000).

²⁸ GREGORY A. CALDEIRA Et al., *The Lobbying activities Of Organized Interests In Federal Judicial Nominations*, 62 J. POL. 51, 51–52 (2000).

²⁹ ANTHONY CHAMPAGNE, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1402 (2001)

viewing judges as policy agents would have no incentive to resist.³⁰ Those inclined to resist in the public interest might find it very difficult to do so.

In such a system, law itself would be seen as nothing more than ordinary politics, and it would become increasingly difficult to appoint (or elect or retain) people with the qualities necessary for judicial independence, because the actors involved would be preoccupied with a degraded notion of judicial accountability.³¹ At the end of the day, judicial independence would become a junior partner to judicial accountability, or the partnership would be dissolved. The imminence of the threat is suggested by a 2005 editorial in the *Washington Post*:

“The war [over Justice O’Connor’s successor] is about money and fundraising as much as it is about jurisprudence and the judicial function. It elevates partisanship and political rhetoric over any serious discussion of law. In the long run, the war over the courts—which teaches both judges and the public at large to view the courts simply as political institutions—threatens judicial independence and the integrity of American justice.”³²

THE CONDUCT OF INTERBRANCH RELATIONS

The problem of interbranch relations concerning the federal judiciary is hardly virgin territory. Robert Katzmann and Charles Geyh have asked and provided thoughtful answers to most of the pertinent general questions concerning the nature, extent, and timing of communications that should occur between the federal judiciary and Congress.³³ Their work, together with that of Judith Resnik,³⁴ well sets the abiding dilemma confronting the federal judiciary of participating in a political system without becoming the victim of politics. That dilemma is acute today, and general prescriptions alone may not be sufficient because so many people who are invested in politics evidently believe, with Gore Vidal: *“It is not enough to succeed. Others must fail.”³⁵* More fundamentally, the agency theory of judicial accountability (that would hold judges “accountable” as policy agents) underlying recent attacks on the courts is not only irreconcilable with

³⁰ BARRY FRIEDMAN, *The Politics Of Judicial Review*, 84 TEX. L. REV. 257, 328 (2005) (“Because Negative Information, Especially a Steady Flow Of It, Can Decrease Diffuse Support, Public Support For The Judiciary Is Subject To Manipulation.”)

³¹ SUSAN S. SILBEY, *The Dream Of a Social Science: Supreme Court Forecasting, Legal Culture, and The Public Sphere*, 2 PERSP. ON POL. 785, 789 (2004) (“Rather Than Better and Worse Craft, Justices Will be assessed Only by Those Who are For Or against Some Position. If The Decisions become Understood Only as Wins and Losses, We Feed The Politicization and Gaming Of Judicial appointments That Have become Ever More Systematic In an Effort To Predict, and Control, The Decisions Of appointees.”)

³² Editorial, *Not a Campaign*, WASH. POST, July 5, 2005, at B6

³³ CHARLES G. GEYH, *Paradise Lost, Paradigm Found: Redefining The Judiciary’s Imperiled Role In Congress*, 71 N.Y.U. L. REV. 1165 (1996)

³⁴ JUDITH RESNIK, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 225–27 (2003)

³⁵ THE OXFORD DICTIONARY OF MODERN QUOTATIONS 221 (Tony auguard Ed., 1991)

traditional notions of judicial independence; it is subversive of norms of respect and mutual accommodation that are essential to productive interbranch relations.

NORMS OF JUDICIAL BEHAVIOR IN INTERBRANCH RELATIONS

The dominant messages I draw from past work on interbranch relations are that the modern federal judiciary should be

1. responsive to appropriate requests for information from congress;
2. prepared to offer the judiciary's views on proposed legislation (whether or not requested to do so), and even to seek to initiate legislative action, in areas of legitimate institutional concern to the judiciary;
3. generous in interpreting the universe of appropriate requests for information from congress; and
4. circumspect in defining areas of legitimate institutional concern to the judiciary. Katzmann's work also highlights the importance of not confining interbranch relations to formal communications, whether they be written responses to requests for information or testimony before congressional committees.³⁶

Daniel Patrick Moynihan believed in what he called the "Iron Law of Emulation,"³⁷ which holds that any time one branch of government develops a technique that gives it an advantage over the other branches, the others will be sure to adopt the same technique. Moynihan's law probably best explains why, at the very time (in the mid-1970s) that the House and Senate substantially increased staff capacity,³⁸ enabling them to monitor more effectively the decisions and rulemaking activities of the federal courts and the federal judiciary, the federal judiciary instituted an Office of Legislative affairs. The resources of this office, together with others in the administrative Office of the United States courts (including particularly the Rules Support Office), well equip the judiciary to monitor proposed legislation affecting the judiciary.

In light of the formidable information base available through the administrative Office and the Federal Judicial center, and the formidable base of expertise and insight available through the committees of the Judicial conference, the main challenges in this area of interbranch relations involve matters of judgment, timing, and tactics.

³⁶ *Supra* Note 25, at 105–06 (Exploring The Ways In Which a Dialogue Could Emerge Between The Judiciary and Legislature In a Section Entitled "Promoting Ongoing Exchanges").

³⁷ DANIEL PATRICK MOYNIHAN, *Counting Our blessings: Reflections On The Future Of america* 118 (1980)

³⁸ WILLIAM N. ESKRIDGE, JR., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 339–41 (1991)

MATTERS OF JUDGMENT

Matters of judgment include when to resist a request for information as inappropriate and how to define the areas that are deemed to be of legitimate institutional concern to the judiciary. The boundaries of appropriate requests for information are limned by a definition of federal judicial accountability that is faithful to our history, including, in particular, the norms and customs that, with the public's support, have enabled our tradition of judicial independence. They are exceeded by requests reflecting aberrant definitions such as that which in recent years transformed oversight of the federal judiciary's implementation of the Sentencing Guidelines into oversight of an individual federal judge's sentencing practices. It appears that the agency theory of judicial accountability caused some members of the House to forget that, under the constitution, congressional "oversight" (or, discipline) of an individual federal judge is appropriate only in connection with a credible impeachment investigation.³⁹ Requests for information (or action) that evidently reflect a contrary view should be resisted. If persuasion and compromise fail, the politics of power may require the judiciary, an individual judge, or both to yield. Yet, even though legislative foolishness or mischief must be abided (if it is not unconstitutional), the foolishness or mischief should be made plain for all to see.

In defining areas of legitimate institutional concern to the judiciary—where it should feel free to make comments and even to seek to initiate legislative action—Judith Resnik's work is particularly valuable. That work persuades me that, even when asked to do so, the federal judiciary should resist becoming embroiled in discussions and debates about proposed legislation that would create new, or alter existing, substantive rights (such as by providing the possibility for women who have been the victims of violence to sue for damages in federal court).⁴⁰ For, just as some legislators may be tempted to transform oversight of the federal judiciary's implementation of a law into oversight of an individual judge, so may some judges be tempted to view a bill that would increase the docket burdens of the federal courts through the prism of a general theory of federalism. Institutional comments on such a bill from that perspective would inevitably be viewed as taking sides on the merits, and they might be invoked in legislative debates by those whose position they favored. Moreover, the resentment harbored by legislators holding a different view on the merits—and their cynicism about whose interests the judiciary's representatives were protecting—could only increase if, the legislation having been enacted, all or part of it were declared unconstitutional.

³⁹ Editorial, *Supra* Note 7

⁴⁰ See RESNIK, *Supra* Note 26, at 294.

attention to the possibility that proposed legislation would add to the burdens of the judiciary, when some courts are already overtaxed, suggests a partial exemption from this prophylactic norm. On the assumption that the federal judiciary can provide reliable estimates of the workload and other resource implications of proposed legislation,⁴¹ such information is obviously germane to legislative deliberations. A history of unreliable estimates would, however, create suspicion either of incompetence or of concealed policy preferences on the merits—neither of which would well serve the interests of productive interbranch relations.

The suggested norm against comment by the judiciary concerns proposed legislation that would create new, or alter existing, substantive rights. By definition, it would seem not to apply to proposed legislation on matters of practice and procedure governing the conduct of litigation in the federal courts. Indeed, with the exception of criminal sentencing matters, it is likely that the greatest volume of communications between the federal judiciary and congress, formal and informal, in recent decades has concerned proposed legislation that would block proposed amendments to, or would directly amend, the rules of procedure that the Supreme court promulgates under the Rules Enabling act.⁴² Such communications are usually not problematic. As I have developed in other work, however, the judiciary should reconsider its practice of objecting to provisions in proposed legislation that contain discrete (non-uniform) procedural rules designed to accommodate legislative policy with respect to a particular substantive law scheme.⁴³

THE JUDICIARY AS AN INTEREST GROUP

The perception that the institutional judiciary is an interest group when seeking, or seeking to avert, legislative action is, of course, another way of framing the abiding dilemma confronting the federal judiciary of participating in a political system without becoming the victim of politics. Viewed as just another interest group, the federal judiciary has no special reason to complain when congress enacts legislation affecting the institution without prior notice or an opportunity to comment at hearings, and in violation of its own rules. It similarly has no special reason to complain, viewed as such, when a legislative provision affecting the judiciary is secured, without prior consultation, through the efforts of the Executive branch. From this perspective, the challenge for the federal judiciary is to avoid the perception that it is “just another interest group”—that its politics are ordinary politics.

⁴¹ See *Id.* at 286, 289, 296 (Revealing That The Judiciary Has Difficulty In Providing accurate Predictions Of Future Workload)

⁴² *act Of June 19, 1934, Ch. 651, 48 Stat. 1064*

⁴³ *Pritchard, Statutes With Multiple Personality Disorders: The Value Of ambiguity In Statutory Design and Interpretation, 54 STAN. L. REV. 627 (2002).*

One way of doing that is to avoid the tactics of interest groups preoccupied with victory and, as a result, willing to initiate, or at least to go along with, irregularities of the legislative process to which they would object if the shoe were on the other foot—hence, my invocation of the Golden Rule in discussing timing and tactics for seeking legislation favorable to the judiciary. More generally, the leaders of the federal judiciary should give sustained thought to the question of the forms and methods of politics that are consistent with the judiciary’s historic roles and functions and with its status as a co-equal branch of the federal government. In doing so, they will find it helpful to distinguish between the political arts of Richard arnold and those of Tom Delay.

THE POLITICS OF JUDICIAL SELECTION

What I have called the agency theory of judicial accountability is most vividly demonstrated at the federal level in the appointment strategies of Presidents who follow what Sheldon Goldman calls a policy agenda—as opposed to a personal or partisan agenda—in making judicial nominations.⁴⁴ Presidents following a policy agenda seek to fill judicial vacancies with individuals they believe will reliably decide cases in accordance with their preferred policies. Moreover, whether because they fear the power of the rule-of-law ideal or the phenomenon my colleague Ted Ruger calls “judicial preference change,”⁴⁵ some Presidents seek protection against changes of mind or heart by nominating individuals with preferences seen to be hard-wired. Finally in this aspect, there is ample and persuasive evidence from both Supreme court and lower federal court appointment experience that presidential pursuit of a policy agenda in making judicial nominations (and the reaction to it by Senators of the opposition party) is the chief cause of the politicization of judicial selection at the federal level.⁴⁶

Selecting strong ideologues with hard-wired preferences is not the only means of seeking judicial policy agents. If a judicial aspirant is not adequately equipped to be a reliable policy agent by background, education, or experience, perhaps he or she can be induced nonetheless to commit to a desired path of judicial decision in advance.⁴⁷ Thus, the First amendment—the same First amendment that was invoked to protect

⁴⁴ SHELDON GOLDMAN, *Picking Federal Judges: Lower Court Selection From Roosevelt Through Reagan* 3–4 (1997)

⁴⁵ THEODORE W. RUGER, *Justice Harry Blackmun and The Phenomenon Of Judicial Preference Change*, 70 MO. L. REV. 1209, 1210, 1217–19 (2005).

⁴⁶ BURBANK, *Alternative Career Resolution II*, *Supra* Note 2, at 1535–36 (“Both The Relatively Noncontroversial Confirmations Of Justices Ginsburg and Breyer and a Comparison Of Lower Court Nominations That Generated Controversy With Those That Did Not Suggest Much More Likely Causal Influences [Than Lengthening Tenures]: The Increasingly Common Practice Of Presidents To Pursue What Sheldon Goldman Calls a Policy agenda In Making Nominations To all Federal appellate Courts and The Senate’s Reaction To Those Nominated Pursuant To Such an agenda.”)

⁴⁷ Similar Motivations May animate Campaign Contributions To Candidates In States That Elect Judges. Whether Or Not Such Contributions In Fact affect Results In Cases Important To Contributors, “Many Judges Concede That Sitting On

Nazis marching in Skokie—has been enlisted in an effort to assimilate judicial elections to the elections of ordinary politics. Thus, judicial independence has been sacrificed at the altar of a degraded notion of judicial accountability. The Supreme court’s opinion in *Republican Party of Minnesota v. White*,⁴⁸ and in particular its treatment of the concept of judicial impartiality, has paved the way for a self-fulfilling prophecy.

If such prophecies are to be confounded rather than fulfilled, and if we are therefore to have judges who are free of policy commitments other than a commitment to the rule of law,⁴⁹ we shall need to rescue both judicial accountability and politics itself from their current degraded states. Today’s complex legal landscape cries out for judges who renounce the partisan and who are not slaves either to a belief system or to an identifiable constituency. It also cries out for humility, by which I mean recognition, in Judge arnold’s words, that “holding . . . a commission signed by the president does not in and of itself confer moral superiority.”⁵⁰

CONCLUSION

In the current political climate, there is reason for concern about adherence to long-standing customs or norms and hence about resort to blunt instruments of influence or control by members of congress determined to work their will on the federal courts and to “take no prisoners” in the process.⁵¹ The same is true in a number of states. The proper response is not—it cannot be—assertions of power that does not exist. The federal judiciary not only lacks a purse and a sword; its shield is very narrow. The same is true of state judiciaries. Wiser heads must prevail, and, if necessary, informed public opinion must be brought to bear on those who are ignorant of, or choose not to heed, the lessons of our constitutional history.

The judiciary needs more judges who are politicians in the sense that Richard arnold was a politician. These are judges for whom people are more important than abstractions, for whom dialogue and deference— involving litigants, other courts, and the other institutions of government—are a two-way street, and for whom reasonable processes and institutions of accountability are viewed not as obstructions but, like the

Their Contributors’ Cases Creates The Perception That Their Votes Can Be Bought.” ADAM LIPTAK & ANET ROBERTS, *Campaign Cash Mirrors a High Court’s Rulings*, N.Y. TIMES, Oct. 1, 2006, § 1, at 1

⁴⁸ 536 U.S. 765, 775–78 (2002) (Holding That a Minnesota “announce Clause,” Which Prohibited Judicial Candidates From announcing Their Personal Views On Disputed Issues Likely To Come Before The Judge (If Elected), Violated The First amendment).

⁴⁹ I Draw a Distinction Between Ideology In The Weak Sense Of The Preferences as To Political, Social, and Economic arrangements That all Sentient adults, and Hence all Judges, Have and That Inevitably affect Decisions In Which There Is an Element Of Discretion, On The One Hand, and Ideology In The Strong Sense Of Preferences That Hold Sway With Such Power as To Be Impervious To adjudicative Facts, Competing Policies, Or The Governing Law as It Is Generally Understood, On The Other. Ideology In This Second Sense Is Revealed as The Enemy Of Judicial Independence. It Is In That Regard No Different From Non-Ideological Pre-Commitment To Certain Legal Positions For The Purpose Of Securing Or Retaining a Judicial Position.

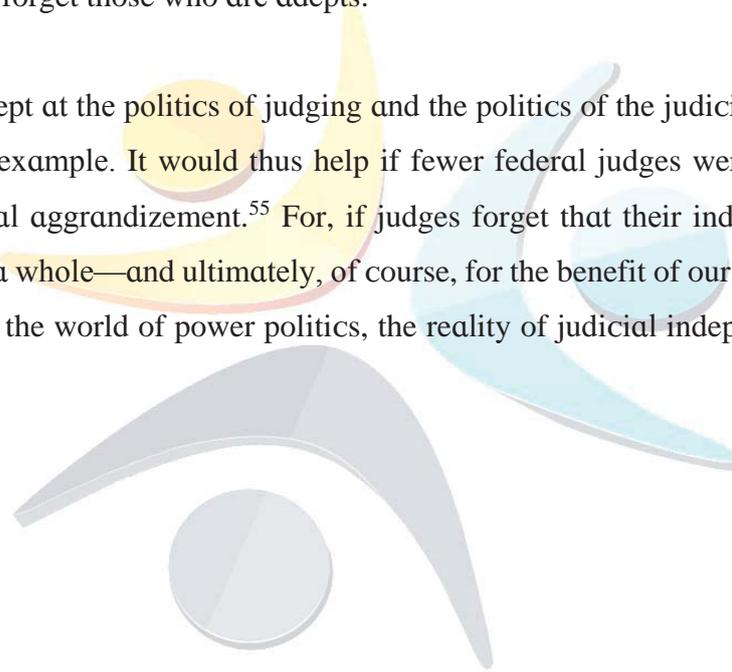
⁵⁰ ARNOLD, *Supra* Note 10, at 5.

⁵¹ Editorial, *Rehnquist To Delay: bug Off On Judges*, SAN ANTONIO EXPRESS, Jan. 12, 2004, at 6B

law itself, as “those wise restraints that make us free.”⁵² Such people need not have a background in politics. Indeed, although the example of Judge arnold suggests that political experience can be helpful, one can easily imagine a different kind of politics—whether one infected with ideology of the strong sort or with relentless partisanship—that would be a handicap.

The notion that the judiciary might take the lead in reestablishing such a politics—of custom, dialogue, compromise, and statesmanship—will come as a shock only to those who believe that politics and law, like judicial independence and accountability, are irreconcilable, or those whose exposure to politically feckless judges has caused them to forget those who are adepts.⁵³

Richard arnold was an adept at the politics of judging and the politics of the judiciary, and it would help if other judges followed his example. It would thus help if fewer federal judges were inclined to “posterity-worship”⁵⁴ and institutional aggrandizement.⁵⁵ For, if judges forget that their independence exists for the benefit of the judiciary as a whole—and ultimately, of course, for the benefit of our system of government—they may discover that, in the world of power politics, the reality of judicial independence does not match the rhetoric.



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⁵² MARVIN HIGHTOWER, *The Spirit and Spectacle Of Harvard Commencement*, available at <https://www.com commencement.harvard.edu/background/spirit.html> (Last Visited September 10, 2015).

⁵³ Editorial, *Politics and Progress In Federal Judicial accountability*, 90 JUDICATURE 52, 53, 92 (2006) Which Reads as “*Far From Hiding The Federal Judiciary’s Dirty Linen In The Closet, The Report Thoroughly Discusses Situations In Which The Judiciary’s Performance Was Deficient, as It Does The Causes That May Be Responsible. Its Numerous Recommendations, If Implemented, Should Measurably Reduce Instances In Which The Judiciary Fails To Police Itself as Envisioned In The 1980 act. Many Of These Recommendations Focus On The Importance Of Providing Timely and accurate Information about The act To Those Responsible For administering It, To Potential Complainants, and To Legislators, The Press, and The Public. Moreover, One Cause Of Problems In “High-Visibility” Dispositions Was The Failure To appreciate The Need To Resolve Public, Non-Frivolous allegations Publicly. The Report’s Embrace Of appropriate Judicial accountability, Of The Role That Public Perception Plays In Maintaining The Traditional Equilibrium Between Independence and accountability, and Of a Candid Yet Sensitive, and above all Non-Defensive, approach To Judicial Self-Regulation, Is One Of Its Most Important Contributions.*”

⁵⁴ JEROME FRANK, *Courts On Trial: Myth and Reality In american Justice* 287–88 (1949)

⁵⁵ MICHAEL W. MCCONNELL, *Institutions and Interpretation: a Critique Of City Of Boerne V. Flores*, 111 HARV. L. REV. 153, 163 (1997) (Noting That Boerne Represents a “Startlingly Strong View Of Judicial Supremacy”)