Stephen B. Burbank

Judicial independence, judicial accountability & interbranch relations

Recent years have witnessed attacks on the courts, federal and state, that have been notable for both their frequency and their stridency.[1] 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 courts and the judges who sit on the bench 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.

What is the precise nature and extent of the threat to judicial independence? How, in the conduct of interbranch relations, should the judiciary respond to the impulses and incentives, both legitimate and illegitimate, that have brought us to this unhappy point in interbranch relations? Successful interbranch relations require the institutional judiciary to avoid the attitudes and techniques of contemporary politics, but not to avoid politics altogether.[2] In essence, judicial accountability, properly conceived, plays

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1 A modified version of this essay first appeared in *The Georgetown Law Journal* 95 (4) (2007). Arlin Adams, Barry Friedman, Charles Geyh, Robert Katzmann, and Carolyn King provided helpful comments on a draft.

2 This essay draws on (without frequent citation to) my interdisciplinary work exploring judicial independence and judicial accountability and the implications for the future of theo-

a critical role in judicial independence, and politics of a certain sort must play a role in the work of courts and the judiciary if they are to continue to serve as the guardians of our fundamental rights and liberties.

Judicial independence is merely the other side of the coin from judicial accountability. The two are not at war with each other but rather are complements; neither is an end in itself but rather a means to an end (or variety of ends); the relevant ends relate not primarily to individual judicial performance but rather to the performance of courts and court systems; and there is no one ideal mix of independence and accountability, but rather the right mix depends upon the goals of those responsible for institutional architecture with respect to a particular court or court system.[3]

From these premises I derive several additional propositions that are helpful in considering the role of interbranch relations in maintaining a desired balance between judicial accountability and judicial independence. First, judicial accountability has as many roles to play as does judicial independence. 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, including, for example (in the case of federal judges), "conduct prejudicial to the effective and expeditious administration of the business of the courts."[4]

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? 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

retical and empirical research concerning interest groups and public knowledge of and attitudes toward courts. For a more comprehensive presentation of some of my arguments, see Stephen B. Burbank and Barry Friedman, eds., *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Thousand Oaks, Calif.: Sage Publications, 2002); Stephen B. Burbank, "Alternative Career Resolution II: Changing the Tenure of Supreme Court Justices," *University of Pennsylvania Law Review* 154 (2006): 1511; Stephen B. Burbank, "The Architecture of Judicial Independence," *Southern California Law Review* 72 (1999): 315; Stephen B. Burbank, "What Do We Mean by 'Judicial Independence'?" *Ohio State Law Journal* 64 (2003): 323. I also draw on work in which I have explored the writings and career of a distinguished federal judge. See Stephen B. Burbank, "Judicial Accountability to the Past, Present, and Future: Precedent, Politics, and Power," *University of Arkansas at Little Rock Law Review* 28 (2005): 19.

3 Burbank and Friedman, "Reconsidering Judicial Independence," in *Judicial Independence at the Crossroads*, ed. Burbank and Friedman, 9; Burbank, "What Do We Mean by 'Judicial Independence'?"

4 See 28 U.S.C., section 351(a) (Supp. III 2003).

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. In each instance, proper regard for the other side of the coin – judicial independence – requires that accountability not entail influence that is deemed to be undue.

Recent scholarship has 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,[5] has thus made it clear that the traditional equilibrium between the federal judiciary and the other branches owes its existence primarily to informal norms and customs. One such norm or custom is to eschew use of the 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.

We know, however, 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. The dynamics leading to our current malaise suggest that 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 remarkably dangerous because of 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. 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 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 often write about judicial independence, but his extrajudicial writings are filled with expressions of concern about judicial accountability. That is not because he thought that everyone understands and accepts judicial independence, defined as a judge might like to define it. He knew that if the federal judiciary is in fact, or is perceived to be, insufficiently accountable it will lose the independence necessary for

5 See Charles Gardner Geyh, *When Courts & Congress Collide: The Struggle for Control of America's Judicial System* (Ann Arbor: University of Michigan Press, 2006).

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"[6] 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"[7] when the law requires an unpopular decision.

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 Judge Arnold gets at in referring to the "continuing consent of the governed" – was consequential in the failure of President Roosevelt's court-packing plan.[8] 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, might not survive the excrescences of contemporary politics regarding the judiciary, were they to persist.

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,[9] and that it is adversely affected by delegitimizing messages, such as those that frame court decisions simply in terms of results – the message that *Bush v. Gore* decided the 2000 election, for example.[10] 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.[11] Although some groups pitch their messages concerning judicial selection in terms of factors not directly related to results in cases (such as partisan-

6 See, for example, Richard S. Arnold, "Judges and the Public," *Litigation* (Summer 1983): 5.

7 Ibid., 59.

8 See Barry Cushman, "Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s," *Buffalo Law Review* 50 (2002): 67–74; Barry Friedman, "Mediated Popular Constitutionalism," *Michigan Law Review* 101 (2003): 2611. On diffuse support, see David Easton, *A Systems Analysis of Political Life* (New York: Wiley, 1965), 273.

9 See James L. Gibson et al., "On the Legitimacy of National High Courts," *American Political Science Review* 92 (1998): 343; see also James L. Gibson et al., "The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?" *British Journal of Political Science* 33 (2003): 553–556, which discusses the framing effect whereby unpopular decisions are cushioned by general views about the Court and the rule of law.

10 See Stephen P. Nicholson and Robert M. Howard, "Framing Support for the Supreme Court in the Aftermath of *Bush v. Gore*," *Journal of Politics* 65 (2003): 676.

11 See generally Jack L. Walker, Jr., *Mobilizing Interest Groups in America: Patrons, Professions, and Social Movements* (Ann Arbor: University of Michigan Press, 1991); Gregory A. Caldeira et al., "The Lobbying Activities of Organized Interests in Federal Judicial Nominations," *Journal of Politics* 62 (2000): 51–52.

ship or general ideology), others frame choices precisely in terms of the supposed effect of individual selection decisions on precedent concerning highly salient issues – the assertion that voting for this nominee will lead to the overruling of *Roe v. Wade*, for example.[12]

Given what we know about public 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?" 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.[13] 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.[14]

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.[15] Their work, together with that of Judith Resnik,[16] well sets the abiding dilemma confronting the federal judiciary of participating in a political system without becoming the victim of politics. That di-

12 See Richard Davis, *Electing Justice: Fixing the Supreme Court Nomination Process* (Oxford and New York: Oxford University Press, 2005), 103; Anthony Champagne, "Interest Groups and Judicial Elections," *Loyola of Los Angeles Law Review* 34 (2001): 1402.

13 See Susan S. Silbey, "The Dream of a Social Science: Supreme Court Forecasting, Legal Culture, and the Public Sphere," *Perspectives on Politics* 2 (2004): 789: "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."

14 Editorial, "Not a Campaign," *The Washington Post*, July 5, 2005.

15 See generally Robert A. Katzmann, ed., *Judges and Legislators: Toward Institutional Comity* (Washington, D.C.: Brookings Institution, 1988); Robert A. Katzmann, *Courts and Congress* (Washington, D.C.: Brookings Institution, 1997); Charles Gardner Geyh, "Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress," *New York University Law Review* 71 (1996): 1165.

16 See, for example, Judith Resnik, "Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power," *Indiana Law Journal* 78 (2003): 225 – 227.

lemma is acute today, and general prescriptions alone may not be sufficient. The agency theory of judicial accountability underlying recent attacks on the courts is not only irreconcilable with traditional notions of judicial independence. It is subversive of norms of respect and mutual accommodation that are essential to productive interbranch relations.

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. In light of the formidable information base available through the Administrative Office of the United States Courts 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 satisfying these norms involve matters of judgment, timing, and tactics.

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. 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 and persuasive in arguing 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.[17] 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.

17 Ibid., 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, 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 on proposed legislation that would create new, or alter existing, substantive rights would not 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 in recent decades has concerned proposed legislation affecting the rules of procedure that the Supreme Court promulgates under the Rules Enabling Act.[18] Such communications are usually not problematic. 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, as many such so-called procedural rules have substantial effects on substantive rights.

Matters of timing and tactics include how to proceed in seeking legislation favorable to the judiciary and how to negotiate over the content of legislation that is of legitimate institutional concern to the judiciary. As to the former, the judiciary would be well-advised to follow the Golden Rule. Having (justly) complained about instances in which legislation affecting the judiciary was enacted without prior notice or consultation, it ill behooves that institution to game the system in the same way because the potential fruits are sweet rather than bitter. As to the latter, one who enters into negotiations should be aware of any norms peculiar to the institutional context, as well as of general norms governing negotiating behavior.

A norm peculiar (albeit by no means unique) to the context of congressional negotiations is that of "logrolling." The horse-trading and compromises that are part and parcel of the legislative process may not be congenial to members of the judiciary – at least not when done publicly. For, although judges on plural courts engage in a similar process when negotiating an opinion for a court or panel,[19] doing so may be thought inconsistent with the traditional vision of law as a determinate body of rules that judges find and apply. To the extent that the position of the federal courts "depend[s] on preserving [their] difference from the other branches of government,"[20] judg-

18 See Act of June 19, 1934, ch. 651, 48 Stat. 1064 (current version at 28 U.S.C., section 2072 – 2074 [2000]). Under this statute, rules promulgated by the Supreme Court that are reported to Congress by May 1 become effective on December 1 if legislation to the contrary is not enacted. 28 U.S.C., section 2074 (2000).

19 See Barry Friedman, "The Politics of Judicial Review," *Texas Law Review* 84 (2005): 280 – 290.

20 Robert G. McCloskey, *The American Supreme Court*, 4th rev. ed. (Chicago: University of Chi-

es negotiating on behalf of the judiciary may fear that by performing such a nonjudicial function, they put that position at risk among members of Congress and members of the public who may not distinguish between the judicial and nonjudicial activities of Article III judges.

A general norm of negotiations is that a negotiating party does not like to have reached what appeared to be a deal, only to be told that the person negotiating on the other side lacked final authority. The institutional federal judiciary is a latter-day hierarchy imposed on what had been a highly decentralized collection of largely autonomous actors. When speaking as an interest group, which is how it may appear to be speaking in its dealings with Congress, the federal judiciary attempts to speak with one voice. Even though it is not possible to prevent individual federal judges from disagreeing, there is no excuse for the institutional judiciary itself to change voices late in the process.

The perception that the institutional judiciary is an interest group when commenting on prospective 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. 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.

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 favorable legislation. 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 coequal 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.

Robert Katzmann's prescription for better interbranch relations evidently reflects the insight that good institutional relations are more likely to result from good interpersonal relations and that good interpersonal relations are built on dialogue and trust.[21] Yet the insight suggests why the challenges of contemporary interbranch relations affecting the federal judiciary are so daunting. For where in contemporary politics is the evidence of dialogue and trust, let alone of other hallmarks of good interpersonal relations, such as patience and compromise? Moreover, in the current climate is there not a heightened risk that, by seeking greater communication with elected politicians and their agents,

cago Press, 2005), 20. Professor McCloskey was commenting here on the Court's "shrewd insight" in refusing "to perform 'non-judicial' functions," to wit, "that the Court's position would ultimately depend on preserving its difference from the other branches of government"; ibid.

21 See Katzmann, *Judges and Legislators*, 105–106, which explores the ways in which a dialogue could emerge between the judiciary and legislature, in a section entitled "Promoting Ongoing Exchanges."

members of the federal judiciary will foster the notion of judicial accountability that treats judges themselves as policy agents and courts as part of ordinary politics?

Judge Arnold was candid about, and humorous in describing, the politics of his appointment to the federal bench.[22] He was also characteristically modest in attributing his appointment and lengthy tenure as chair of the Budget Committee of the Judicial Conference of the United States to his pre-judicial service as legislative assistant to Senator Dale Bumpers, a member of the Appropriations Subcommittee for the judiciary.[23] Judge Arnold enjoyed his service as chair of the Budget Committee, he said, because, "[i]t has a little touch of politics about it . . . and I have always enjoyed politics."[24] He also observed that "[p]olitics is people, . . . and it should be and can be an honorable profession."[25] On another occasion, however, noting that "many members of the public seem to feel that judges are just politicians in another guise," Judge Arnold concluded that "[s]ometimes some of us are, but we should not be."[26]

These views are not inconsistent. Judge Arnold, although a judge while acting as chair of the Budget Committee, was not acting as part of a court exercising judicial power. Moreover, he could and likely would have distinguished between a federal judge and an elected politician with words similar to those he used to describe why the federal judiciary is not usually uppermost in the minds of members of Congress: "we lack a particular constituency."[27] In any event, that Judge Arnold disapproved of deeming federal judges "just politicians" hardly suggests that he intended the bright line between law and politics that the distinction might suggest.

I believe that Judge Arnold would have recognized that the more indeterminate law is, and therefore the more room there is for the play of policy and preference, the more legitimate – and the more important – it is for a court of last resort also to take account of considerations that bear on the perceived legitimacy and continuing effectiveness of the judiciary as a whole. If so, he would have distinguished between (1) a situation in which, responding to popular sentiment at the time, a court evaded a result that either clear and controlling precedent or the unmistakable tenor of positive law required, and (2) a situation in which (precedent or positive law not unmistakably dictating the result) the court considered the implications of alternative decisions for the continuing ability of courts not to "pull their punches" in other cases – namely, those in which the law as generally understood leaves no room for equivocation.

In the first situation, the court would be engaged in a political act difficult to distinguish from the behavior of an elected politician responding to a constituency. In the second, the behavior would be "political" only in the sense

22 See, for example, Richard S. Arnold, "The Federal Courts: Causes of Discontent," *Southern Methodist University Law Review* 56 (2003): 767–768; "So I got confirmed in the elevator," 768.

23 Richard S. Arnold, "Money, or the Relations of the Judicial Branch with the Other Two Branches, Legislative and Executive," *St. Louis University Law Journal* 40 (1996): 22.

24 Obituary, *Arkansas Democrat-Gazette*, September 25, 2004.

25 Ibid.

26 Richard S. Arnold, "The Future of the Federal Courts," *Missouri Law Review* 60 (1995): 545.

27 Arnold, "Money," 25.

that statesmanship, deference, and compromise in a world of disputable premises and conclusions are part of the art of governance. Judge Arnold understood that courts are involved in politics, and, far from regretting that fact, he rejoiced in it. He once observed:

> The courts, like the rest of the government, depend on the consent of the governed. And we judges are, in a sense, political. I have sometimes described myself as a professional politician, because I think that the courts are, in the finest and broadest sense of the word, a political institution. We function not on paper or in the abstract, but as part of a real, living system of government, each part of which has its own role to play.[28]

For Richard Arnold, the notion that law is nothing more than politics was not a cause of despair because, for him, law was equally nothing less than politics: specifically, the art of seeking to improve the human condition through intelligence, patience, persuasion, and compromise.

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.[29] 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 Ted Ruger calls "judicial preference change,"[30] some presidents seek protection against changes of mind or heart by nominating individuals with preferences seen to be hard-wired. 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.[31]

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 back-

28 Richard Arnold, Judge for the U.S. Court of Appeals for the Eighth Circuit, Address, in *Symposium on the Judiciary*, ed. Patricia A. Eables and John P. Gill (Arkansas Bar Association, 1989), 12.

29 See Sheldon Goldman, *Picking Federal Judges: Lower Court Selection From Roosevelt Through Reagan* (New Haven: Yale University Press, 1997), 3–4, which distinguishes a policy agenda from a partisan or personal agenda; Carolyn Dineen King, "Current Challenges to the Federal Judiciary," *Louisiana Law Review* 66 (2006): 667: "What this selection process conveys to the public is the notion that the Judiciary is yet another political branch of the government, a kind of stepchild of the other two branches."

30 See Theodore W. Ruger, "Justice Harry Blackmun and the Phenomenon of Judicial Preference Change," *Missouri Law Review* 70 (2005): 1210, 1217–1219.

31 See Burbank, "Alternative Career Resolution II," 1535–1536: "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."

ground, education, or experience, perhaps he or she can be induced nonetheless to commit to a desired path of judicial decision in advance. Thus, the First Amendment has been enlisted in an effort to assimilate judicial elections to the elections of ordinary politics, and judicial independence therefore has been sacrificed at the altar of a degraded notion of judicial accountability. The Supreme Court's decision in *Republican Party of Minnesota v. White*,[32] 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, 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."[33]

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.[34] The same is true in a number of states. The proper response is not – it cannot be – assertions of power that do not exist. The judiciary not only lacks a purse and a sword; its shield is very narrow. 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 gov-

32 536 U.S. 765, 775 – 778 (2002), which holds that a Minnesota Announce Clause, prohibiting judicial candidates from announcing their personal views on disputed issues likely to come before the judge (if elected), violated the First Amendment.

33 Arnold, "Judges and the Public," 5.

34 This was Tom DeLay's admiring assessment of the approach of the so-called House Working Group on Judicial Accountability. See Editorial, "Rehnquist to DeLay: Bug off on Judges," *San Antonio Express*, January 12, 2004. In correspondence with Todd Metcalf, a legislative assistant to Representative Max Sandlin, who sought my views on certain questions raised by the reported plans of this group, I observed:

> Representative Sandlin would know better than I whether a self-appointed group of members of the House from one side of the aisle has standing or power to do anything, other than further pollute discourse that is already debased. I would have thought not. The risk, however, is precisely that, by adding to a legislative corpus of misinformation and inter-branch hostility that is already too large, the House Working Group will influence those who do have power. In that regard, the quoted characterization of the group's "take no prisoners" approach, however praiseworthy in the pursuit of termites, manifests a woefully ignorant and inappropriate attitude towards an institution for the establishment of which our ancestors fought and died and which has been a cornerstone of our freedoms.

Email from Stephen B. Burbank to Todd Metcalf, October 23, 2003 (on file with author).

ernment – are a two-way street, and for whom reasonable processes and institutions of accountability are viewed not as obstructions but, like the law itself, as "those wise restraints that make us free."[35] 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, 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.

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 "[p]osterity-worship"[36] and institutional aggrandizement.[37] 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.

35 This language is part of the citation read by the president of Harvard University in conferring the JD degree at commencement. See Marvin Hightower, The Spirit and Spectacle of Harvard Commencement, http://www.commencement.harvard.edu/background/spirit.html (accessed December 20, 2006).

36 Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton: Princeton University Press, 1949), 287–288: "No doubt it expands the ego of a judge to look upon himself as the guardian of the general future. But his more humble yet more important and immediate task is to decide individual, actual, present, cases. . . . Such judicial legislation as inheres in formulating legal rules is inescapable. But courts should be modest in their legislative efforts to control the future. . . . The future can become as perniciously tyrannical as the past. Posterity-worship can be as bad as ancestor-worship," quoting *Aero Spark Plug Co. v. B.G. Corp.*, 130 F.2d 290, 295–296 (2nd Cir. 1942) (Frank, J., concurring).

37 See Michael W. McConnell, "Institutions and Interpretation: A Critique of *City of Boerne v. Flores*," *Harvard Law Review* 111 (1997): 163, which notes that *Boerne* represents a "startlingly strong view of judicial supremacy"; Peter M. Shane, "When Inter-Branch Norms Break Down: Of Arms-for-Hostages, 'Orderly Shutdowns,' Presidential Impeachments, and Judicial 'Coups,'" *Cornell Journal of Law and Public Policy* 12 (2003): 510, which notes that of "151 federal statutes declared unconstitutional in whole or part by the Court between 1789 and June 2000, 40 – over 26% – were declared unconstitutional since 1981"; see also Richard A. Posner, "Judicial Autonomy in a Political Environment," *Arizona State Law Journal* 38 (2006): 13: "In short, would we not be better served by greater judicial modesty?"