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# Judicial Independence, Judicial Accountability, and Interbranch Relations

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## ABSTRACT

*In this Essay, I argue that the main cause of the poisonous state of interbranch relations involving the federal judiciary, as of the frequent and strident attacks on courts—federal and state—are strategies calculated to persuade the public that courts are part of ordinary politics and thus that judges are policy agents to be held accountable as such. Although unremarkable in the sense that a breakdown in norms of interdependence is a defining characteristic of contemporary politics, I regard the current situation involving the federal judiciary as remarkably dangerous because of the possibility that a tipping point of no return to the traditional equilibrium in interbranch relations may be reached. That prospect is suggested by the insight that our “tradition of judicial independence” has depended critically on the public’s support of the courts irrespective of the decisions they make (“diffuse support”), and by research that provides reason to fear that the distinction between diffuse support and support depending on those decisions (“specific support”) will disappear, leading people to ask of the judiciary not, “What does the law require?,” but rather, “What have you done for me lately?” I then 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. I conclude that successful interbranch relations require the institutional judiciary to avoid the attitudes and techniques of contemporary politics, but not to avoid politics, and that the main challenge in that regard is to avoid the perception that the federal judiciary is just another interest group. Finally, using the writings and career of the late Richard Arnold to exemplify what is needed in the politics of judging as well as the politics of the judiciary, I argue for judges to provide leadership in a return to norms of custom, dialogue, and statesmanship in interbranch relations. In order to do so, more federal judges will need to follow Arnold’s example in recognizing that a presidential commission does not confer moral superiority; that judicial accountability, properly conceived, is essential for judicial independence; and that both “posterity worship” (the attempt to control the future) and institutional aggrandizement are inimical to the long-term interests of the federal courts and the federal judiciary.*

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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.<sup>1</sup> 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

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1. See, e.g., *infra* text accompanying notes 13, 57.

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.<sup>2</sup> I also draw on 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.<sup>3</sup> 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.<sup>4</sup>

## I. 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.

### A. 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 account-

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2. For a more comprehensive presentation of some of my arguments, see *JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* (Stephen B. Burbank & Barry Friedman eds., 2002); Stephen B. Burbank, *Alternative Career Resolution II: Changing the Tenure of Supreme Court Justices*, 154 U. PA. L. REV. 1511 (2006) [hereinafter Burbank, *Alternative Career Resolution II*]; Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315 (1999); Stephen B. Burbank, *What Do We Mean by "Judicial Independence"?*, 64 OHIO ST. L.J. 323 (2003) [hereinafter Burbank, *What Do We Mean by "Judicial Independence"?*].

3. See Stephen B. Burbank, *Judicial Accountability to the Past, Present, and Future: Precedent, Politics and Power*, 28 U. ARK. LITTLE ROCK L. REV. 19 (2005).

4. 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.

ability (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.<sup>5</sup>

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 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”).<sup>6</sup>

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 intrabranched accountability is essential if potentially inappropriate interbranch accountability is to be avoided.<sup>7</sup> In each instance, proper regard for the

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5. See Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS, *supra* note 2, at 9; Burbank, *What Do We Mean by “Judicial Independence”?*, *supra* note 2.

6. See 28 U.S.C. § 351(a) (Supp. III 2003).

7. See Editorial, *Separation of Powers and Mutual Respect*, 87 JUDICATURE 200, 201 (2004) (“[Rep. Sensenbrenner] seems not to be aware, however, that the impeachment process is the only constitutionally valid means by which Congress may discipline federal judges, and thus that the 1980 legislation to which he referred—which explicitly does not reach situations in which impeachment may be justified—is not an example of ‘delegated’ legislative power in the traditional sense. Rather, it represents

other side of the coin—that is, for judicial independence—requires that accountability not entail influence that is deemed to be undue.

#### B. 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,<sup>8</sup> 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 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.<sup>9</sup> 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

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legislation necessary and proper to shore up and rationalize power that the institutional federal judiciary previously exercised on its own without benefit of specific legislation.”)

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

9. See generally 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).

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 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”<sup>10</sup> 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”<sup>11</sup> 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,<sup>12</sup> 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,”<sup>13</sup> I imagine Judge Arnold responding, “I certainly hope so.” I also imagine him wondering how long that will be true.

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10. See, e.g., Richard S. Arnold, *Judges and the Public*, LITIG., Summer 1983, at 5, 5.

11. *Id.* at 59.

12. See *Schiavo ex rel. Schindler v. Schiavo*, 357 F. Supp. 2d 1378 (M.D. Fla.), *aff'd*, 403 F.3d 1223 (11th Cir.), *and reh'g denied*, 403 F.3d 1261 (11th Cir.), *stay denied*, 544 U.S. 945, *and stay denied*, 544 U.S. 957 (2005).

13. See 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; see also Editorial, *Listening to Judge Lefkow*, 88 JUDICATURE 240 (2005).

## C. 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.<sup>14</sup> 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,<sup>15</sup> 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,<sup>16</sup> 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).<sup>17</sup> 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),<sup>18</sup> receive extensive and prolonged media coverage, or are perceived to have a direct relationship to an individual’s “community.”<sup>19</sup>

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 communica-

14. See Barry Cushman, *Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s*, 50 *BUFF. L. REV.* 7, 67–74 (2002); Barry Friedman, *Mediated Popular Constitutionalism*, 101 *MICH. L. REV.* 2596, 2611 (2003). On diffuse support, see DAVID EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* 273 (1965).

15. Substantial, albeit somewhat diminished, diffuse support for the Court persists notwithstanding predictions to the contrary following *Bush v. Gore*, 531 U.S. 98 (2000). See 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* decision).

16. See 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).

17. See Stephen P. Nicholson & Robert M. Howard, *Framing Support for the Supreme Court in the Aftermath of Bush v. Gore*, 65 *J. POLITICS* 676 (2003).

18. See 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).

19. 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).



tions with their members to indirect communications through the mass media.<sup>20</sup> 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*).<sup>21</sup>

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 viewing judges as policy agents would have no incentive to resist.<sup>22</sup> 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.<sup>23</sup> 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

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20. See generally JACK L. WALKER JR., *MOBILIZING INTEREST GROUPS IN AMERICA: PATRONS, PROFESSIONS, AND SOCIAL MOVEMENTS* (1991); Gregory A. Caldeira et al., *The Lobbying Activities of Organized Interests in Federal Judicial Nominations*, 62 J. POL. 51, 51–52 (2000).

21. See RICHARD DAVIS, *ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS* 103 (2005); Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1402 (2001).

22. Cf. 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.”).

23. See 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.”).

at large to view the courts simply as political institutions—threatens judicial independence and the integrity of American justice.<sup>24</sup>

## II. 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.<sup>25</sup> Their work, together with that of Judith Resnik,<sup>26</sup> 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.”<sup>27</sup> 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 traditional notions of judicial independence; it is subversive of norms of respect and mutual accommodation that are essential to productive interbranch relations.

### A. 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.<sup>28</sup>

Daniel Patrick Moynihan believed in what he called the “Iron Law of

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

25. See generally JUDGES AND LEGISLATURES: TOWARD INSTITUTIONAL COMITY (Robert A. Katzmann ed., 1988); ROBERT A. KATZMANN, COURTS AND CONGRESS (1997); Charles G. Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary’s Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165 (1996).

26. See, e.g., Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 225–27 (2003).

27. THE OXFORD DICTIONARY OF MODERN QUOTATIONS 221 (Tony Auguard ed., 1991).

28. See KATZMANN, *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”).

Emulation,”<sup>29</sup> 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,<sup>30</sup> 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.

#### B. 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.<sup>31</sup> Requests for

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29. DANIEL PATRICK MOYNIHAN, *COUNTING OUR BLESSINGS: REFLECTIONS ON THE FUTURE OF AMERICA* 118 (1980).

30. See Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 *NOTRE DAME L. REV.* 1677, 1726–28 (2004); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331, 339–41 (1991).

31. See Editorial, *supra* note 7. The same underlying cause may have prompted a remarkable letter to the Chief Judge of the United States Court of Appeals for the Seventh Circuit from the Chair of the House Judiciary Committee, complaining about an allegedly “illegal” sentence that a panel of that court let stand, and requesting a “prompt response with respect to what steps the Court of Appeals intends to take to rectify the panel’s actions.” American Judicature Society, *Judicial Independence*: Article, [http://www.ajs.org/include/story.asp?content\\_id=418](http://www.ajs.org/include/story.asp?content_id=418) (last visited Dec. 20, 2006) (quoting Rep. Sensenbrenner, Chairman of the House Judiciary Committee). As I stated for the American Judicature Society:

AJS believes that the American people have a right to expect that the leaders of Congress will not go off half-cocked in pursuit of a vision of “oversight” that is not only demonstrably inconsistent with the constitutionally-prescribed separation of powers, but radically at odds

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).<sup>32</sup> 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.

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,<sup>33</sup> 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

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with historical practice . . . . Chairman Sensenbrenner is a bull in a china shop who cannot distinguish between "oversight" of individual federal judges and individual cases while they are pending, both of which are wholly inappropriate unless perhaps as part of an impeachment investigation, and oversight of the federal judiciary as a whole, which is certainly an appropriate and important duty of Congress.

*Id.*

32. See Resnik, *supra* note 26, at 294.

33. *But see id.* at 286, 289, 296 (revealing that the judiciary has difficulty in providing accurate predictions of future workload).

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.<sup>34</sup> 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.<sup>35</sup>

### C. MATTERS OF TIMING AND TACTICS

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—as, for example, when included at the last minute in an appropriations bill—it ill behooves that institution to game the system in the same way because the potential fruits are sweet rather than bitter.<sup>36</sup> 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 and assumptions governing negotiating behavior.

A norm peculiar (albeit by no means unique) to the context of congressional negotiations is that of “logrolling.” As David Law has observed, “[f]or senators, logrolling goes unremarked as collegiality or business as usual.”<sup>37</sup> The horse-trading and compromises that are part and parcel of the legislative process may

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34. See Act of June 19, 1934, ch. 651, 48 Stat. 1064 (current version at 28 U.S.C. §§ 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. § 2074.

35. Given widespread knowledge today that many so-called procedural rules have substantial effects on substantive rights—the modern class action rule, dating to 1966, being perhaps the most prominent example—the invocation of “The Enabling Act Process” as an objection to a rule that could not be promulgated pursuant to that process (because, being substance-specific, it would not be a “general rule” authorized by the Rules Enabling Act, see 28 U.S.C. § 2072(a)), may appear to be an attempt by the judiciary to reestablish monopoly power over “procedure” as a means to bury substantive policy choices. If inconsistently voiced, “The Enabling Act Process” objection may also be thought a mask for disagreement on the merits. See Burbank, *supra* note 30, at 1729–33, 1737–39; Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627 (2002).

36. See Edward R. Becker, *Of Laws and Sausages*, 87 JUDICATURE 7, 8 (2003).

37. David S. Law, *Appointing Federal Judges: The President, the Senate, and the Prisoner's Dilemma*, 26 CARDOZO L. REV. 479, 510 (2005). Professor Scherer attributes the reluctance of Presidents “to enter into judicial log-rolls” to the fact that “key party and issue activists today place ideological purity over political compromise.” NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS 152–53 (2005).

not be congenial to members of the judiciary. More realistically, participation in a quasi-public process involving such tradeoffs may not be congenial. For, although informed observers know that judges on plural courts engage in a similar process when negotiating an opinion for a court or panel,<sup>38</sup> 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,”<sup>39</sup> judges negotiating on behalf of the judiciary may fear that by performing such a non-judicial function, they put that position at risk among members of Congress and members of the public who may not distinguish between the judicial and non-judicial activities of Article III judges.

A general norm of negotiations is that a negotiating party does not like to negotiate against himself—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 most of 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.<sup>40</sup>

#### D. 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

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38. See Friedman, *supra* note 22, at 280–90.

39. ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 20 (4th rev. ed. 2005). 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.” *Id.*

40. This is one view of the process that led to the Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended at 28 U.S.C. §§ 471–482 (2000)). See Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 232 (1997) (describing how the federal judiciary designated a task force of judges to work with the Senate Judiciary Committee on revising the Civil Justice Reform Act but later “publicly expressed continuing opposition”).

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 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.

### III. THE POLITICS OF THE FEDERAL JUDICIARY

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.<sup>41</sup> 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, 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? The federal judiciary is not the only victim of contemporary politics, and the risk I posit is different merely in degree, not in kind, from that which for so many years kept the federal judiciary at arm’s length from the other branches.

#### A. “JUST POLITICIANS”?

Judge Arnold was candid about, and humorous in describing, the politics of his appointment to the federal bench.<sup>42</sup> 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.<sup>43</sup> 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.”<sup>44</sup> He also observed that “[p]olitics is

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41. See *supra* text accompanying note 28.

42. See, e.g., Richard S. Arnold, *The Federal Courts: Causes of Discontent*, 56 SMU L. REV. 767, 767–68 (2003); *id.* at 768 (“So I got confirmed in the elevator.”).

43. Richard S. Arnold, *Money, or the Relations of the Judicial Branch with the Other Two Branches, Legislative and Executive*, 40 ST. LOUIS U. L.J. 19, 22 (1996).

44. Obituary, ARK. DEMOCRAT-GAZETTE, Sept. 25, 2004, at 8B.

people, . . . and it should be and can be an honorable profession.”<sup>45</sup> 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.”<sup>46</sup>

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.”<sup>47</sup> 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 clearly 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 that statesmanship, deference, and compromise in a world of disputable premises and conclusions are part of the art of governance. Put another way, like separation of powers, to which it is instrumental, judicial independence should be seen as “an architecture that has structural integrity but can nevertheless adapt spaces and functions to meet changing needs.”<sup>48</sup>

Judge Arnold understood that courts are involved in politics, and, far from regretting that fact, he rejoiced in it. He once observed that

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

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45. *Id.*

46. Richard S. Arnold, *The Future of the Federal Courts*, 60 *Mo. L. Rev.* 533, 545 (1995).

47. Arnold, *supra* note 43, at 25.

48. Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 *IND. L.J.* 233, 265 (1990).



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.<sup>49</sup>

For Richard Arnold, the notion—fashionable twenty years ago and in radically different (or different radical) circles today—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.

#### B. 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.<sup>50</sup> 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,”<sup>51</sup> 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.<sup>52</sup>

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

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49. Richard Arnold, Judge for the U.S. Court of Appeals for Eighth Circuit, Address, in SYMPOSIUM ON THE JUDICIARY 12 (Patricia A. Eables & John P. Gill eds., 1989).

50. See SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 3–4 (1997) (distinguishing a policy agenda from a partisan or personal agenda); Carolyn Dineen King, *Current Challenges to the Federal Judiciary*, 66 LA. L. REV. 661, 667 (2006) (“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.”).

51. See Theodore W. Ruger, *Justice Harry Blackmun and the Phenomenon of Judicial Preference Change*, 70 MO. L. REV. 1209, 1210, 1217–19 (2005).

52. See 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.”).

judicial decision in advance.<sup>53</sup> Thus, the First Amendment—the same First Amendment that was invoked to protect 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*,<sup>54</sup> 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,<sup>55</sup> 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.”<sup>56</sup>

#### 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.<sup>57</sup> The same is true

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53. 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, “[m]any judges concede that sitting on their contributors’ cases creates the perception that their votes can be bought.” Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court’s Rulings*, N.Y. TIMES, Oct. 1, 2006, § 1, at 1. That perception among members of the public is potentially fatal to the rule of law. See *supra* text accompanying notes 22–24.

54. 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).

55. 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.

56. Arnold, *supra* note 10, at 5.

57. 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, Jan. 12, 2004, at 6B. 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

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 law itself, as “those wise restraints that make us free.”<sup>58</sup> 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.<sup>59</sup>

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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.

E-mail from Stephen B. Burbank to Todd Metcalf (Oct. 23, 2003) (on file with author).

58. This language is part of the citation read by the President of Harvard University in conferring the J.D. degree at commencement. *See* Marvin Hightower, *The Spirit and Spectacle of Harvard Commencement*, <http://www commencement.harvard.edu/background/spirit.html> (last visited Dec. 20, 2006).

59. For evidence that the federal judiciary is capable of marrying good politics to good policy in response to intemperate (but not wholly unjustified) congressional criticism, see generally *THE JUDICIAL CONDUCT & DISABILITY ACT STUDY COMM., IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980: A REPORT TO THE CHIEF JUSTICE* (Sept. 2006). A recent editorial described the report as follows:

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.

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”<sup>60</sup> and institutional aggrandizement.<sup>61</sup> 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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Editorial, *Politics and Progress in Federal Judicial Accountability*, 90 JUDICATURE 52, 53, 92 (2006).

60. JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 287–88 (1949) (“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, 295–96 (2d Cir. 1942) (Frank, J., concurring))).

61. See 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”); Shane, *supra* note 9, at 510 (noting 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*, 38 ARIZ. ST. L.J. 1, 13 (2006) (“In short, would we not be better served by greater judicial modesty?”).

