Thursday – May 15, 2008

Citizens' Forum On Judicial Accountability

AFFIRMATIVE DEBATE POSITION

***Resolved*:** Adequate judicial oversight is generally available in America through well-established government processes.

Argument I:

A. Collectively, well established government processes provide adequate judicial oversight in America because they:

1. are readily accessible to the extent applicable;
2. allow multi-faceted, exhaustive, and graduated scrutiny both laterally and vertically;
3. provide a means of comprehensive and effective relief;
4. correspond to the separation of powers between the three (3) branches of American government; and
5. have been refined by a long history of legislative action and judicial precedent.

B. These processes should not be supplemented or replaced by any provision leaving all or part of the American judiciary, more subservient to other branches of government and/or popular sentiment. Why, because:

1. the American judiciary was intended to have a specific level of independence provided by the U. S. Constitution with the same or similar concern shown in state constitutions:

» The United States Constitution provides for three separate and independent branches of government, the much familiar system of checks and balances. The federal judiciary, not beholden to the executive or legislative branch through reappointment or to popular will through election, holds office through what is termed lifetime appointment. The Federalist Papers were published while the Constitutional Convention was ongoing and give us the best idea of the debates and thought processes attending the birth of the Constitution. The need for an independent judiciary was raised in the Federalist 51. To establish an independent judiciary, Article III sec. 1 of the U. S. Constitution provides that judges " . . . hold their Offices during good Behaviour" and provides for non-diminution of salary as well.

» An often cited quote is from Alexander Hamilton speaking of a need : (1) to guarantee a steady and impartial administration of the laws and (2) to safeguard against injury of private rights of particular classes of citizens by unjust and partial laws. The Federalist Papers remind us that "complete independence of the courts of justice is peculiarly essential in a limited Constitution" – one that does not allow for bills of attainder and ex post facto laws – as "limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it is to declare all acts contrary to the manifest tenor of the Constitution void". An independent judiciary guarantees its neutrality, integrity, impartiality, fairness, freedom from potential legislative domination, freedom from potential executive

domination. It also guarantees no fear of consequences or intimidation from other branches of government, no influence from politics, and freedom from consequences occasioned by a hostile press. Retired Supreme Court Justice Sandra Day O' Connor has said it also prevents dictatorship.

2. to be more subservient or less independent would leave judges accountable for legitimate, but questionable or unpopular behavior:

» An independent judiciary was created not as an end in itself, but to serve a useful governmental purpose. The sources explaining the reasons are varied, many of the duties being discussed in various Supreme Court opinions, legal commentaries, and the like. Some of these purposes are: to decide cases and controversies fairly and without influence of any kind; to check abuse of legislative and executive branches; to guarantee an impartial forum; to decide according to law and facts and to give the public the impression this is done; to insure rule of law instead of rule by fiat; to protect minority rights against a sometimes tyrannical majority; to decide cases and controversies only on the law and the facts; to protect decisions from any other kind of influence; to protect citizens from arbitrary action by federal, state, or local government; and a good deal more. That a court might reach a decision in favor of a private litigant against the government or determine that action taken by the executive or legislation passed by Congress is violative of the Constitution is unlikely to be favored by either branch.

» *Mabury v. Madison* disturbed many members of Congress as well as President Jefferson himself. *Schechter Poultry v. United States* struck down the National Industrial Recovery Act (NIRA) which allowed bureaucrats and industries to draw up codes to help stimulate employment and business recovery with codes being signed off by the President. The opinion characterized abdication of legislative power to the executive branch as "delegation run riot", noting that extraordinary emergencies (like the Depression) do not create or enlarge constitutional power. *Schechter* was one reason Franklin D. Roosevelt wanted to pack the court with maybe half a dozen or more justices. *Baker v. Carr* as one of several decisions against gerrymandering and unequal legislative districts, was disliked by many state legislators and some congressmen whose powerbase and electability hinged on such districts. It takes a court that is not subservient to any other branch of government to reach a decision against a branch of government.

» Roger K. Warren, past President of the National Center for State Courts, said in a speech that (1) the judiciary itself must lead the charge to create a culture of continuous improvement in itself and (2) the judiciary needs to set appropriate standards for performance, communicate those standards, and demonstrate that those standards are met.

» Justice Breyer has quoted Justice Kennedy saying that (1) only those who serve can fully understand the struggle to achieve judicial independence in all its branches. In short, one might say, that the judiciary understands itself and its functions the best and for those reasons can best police itself.

» If non-judges were allowed to police judges and/or judicial immunity was removed, there could be a hostile pool of candidates seeking to police judges and a hostile pool of plaintiffs

waiting to sue them. This hostile pool would theoretically consist of at least half of America's litigants, each case having a winner and a loser.

» Some critics want to be appeased by the courts. They are not completely satisfied unless they get everything they want from the courts, will not settle for all they are entitled to under the law, and are not satisfied with obtaining most of what they want. Such appeasement is not the function of the courts.

» For these reasons and others there is a consensus among judges that self-policing works; if it is an imperfect system, there is nothing better; and no other agency of government or private group has a superior understanding of the judicial process or can do the job any better.

Argument II:

A. Judicial accountability for legitimate, but questionable or unpopular behavior actually defeats more than creates or preserves a fair and impartial judiciary:

» What of decisions that were highly questionable and elicited particularly strong reaction among the citizenry and members of Congress? *Dred Scott v. Sandford* declaring Negroes were not citizens and invigorating the Fugitive Slave Act has been cited as a stain on America's judiciary. More recently , *Plessey v. Ferguson* established "separate but equal" and gave a green light to Jim Crow. It was overruled by *Brown v. Board of Education* which was widely disparaged in the media for months. An attempt by Governor Faubus and the Arkansas legislature to ignore and nullify *Brown* occasioned *Cooper v. Allen*, sending the National Guard and federal troops to maintain order at Little Rock schools for the rest of the year.

» Rather than engaging in social engineering as its more sophisticated critics charged, all *Brown* did was extend existing rights of equal protection to a group of citizens not enjoying those rights. With little relief forthcoming from other branches of government, *Brown v. School Board* could not have been decided had there not been an independent and non-subservient judiciary. If it had to account to other branches of government, answering for questionable but legitimate behavior would have defeated the concept and impaired the performance of a fair and impartial judiciary.

» Aside from *Brown v. School Board* and its progeny, a similar argument could be made for certain 1960s cases by the Warren Court in extending constitutional protections to accused individuals and criminal defendants. *Gideon v. Wainwright* established the right of indigent criminal defendants to have appointed counsel; *Miranda v. Arizona* with its mandatory warnings and right to silence were highly unpopular and took quite some time for the law enforcement community to accept. Although not nearly as unpopular, *Mapp v. Ohio* imposed 4th Amendment standards on the states through the due process clause of the 14th Amendment; and *Monroe v. Pape* held that police officers could be liable under 42 U S C sec 1983 for intentional violations of civil rights.

» Perhaps the point to be made is that these and other decisions could not have been made absent an independent judiciary that did not have to account for legitimate but unpopular behavior when it was doing its job.

» Some measures suggested or introduced as bills in Congress are viewed as infringing on judicial independence. The Judicial Transparency and Ethics Enhancement Act seeks to establish an Inspector General for the federal courts with the IG possibly acting more as an agent of Congress than anything else. Bills to withdraw jurisdiction of the federal courts from certain types of cases are similarly viewed as infringing on judicial independence. Arguably any congressional supervision would compromise judicial independence, make judges subservient to the popular will rather than the rule of law, and cast judges more in the role of politicians trying to appease their constituency.

Rebuttal:

A. The notion that America's processes for judicial oversight are thoroughly corrupted hinges on various perceptions of conspiracies too expansive to conceal.

» Perhaps the most widespread judicial scandal in this country was Operation Greylord conducted by the F B I and the I R S Criminal Investigation Division. There were over 90 judges on the Circuit Court of Cook County, Illinois and the Chief Judge of the Circuit Court cooperated with the investigation. 92 people were indicted: 17 judges, 48 lawyers, 10 deputy sheriffs, 8 policemen, 8 court officials, and a member of the legislature. Despite the numerous total of individuals indicted; most judges, most deputy sheriffs, most cops, most lawyers, most court personnel were not involved. Rather than having a vast conspiracy, what was involved were a good many individual instances of bribery and fixing cases carried out between some judges and a few lawyers who knew the judge could be bought. A really vast conspiracy seems out of the question.

» Part of the problem with conspiracies is the more conspirators involved, the more likely they are to unravel and the easier they are to detect. Allegations of very widespread corruption involving many or most judges, several times that many attorneys, a good many in law enforcement, and so on seems quite implausible as at least a few members of such a conspiracy are bound to be detected. The unraveling of widespread conspiracies is said to increase with the number of conspirators or the square of their number. But so far what we seem to get is at best numerous instances or many small conspiracies as we saw in Greylord.

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