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## ESSAY

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### MAKING HEADS OR TAILS OF JUDICIAL INDEPENDENCE: A RESPONSE TO PROFESSOR BURBANK

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In his essay, *Reconsidering Judicial Independence*, Professor Burbank urges that judicial independence and judicial accountability are “different sides of the same coin.”<sup>1</sup> But I am not so sure, at least as to the way in which he envisions judicial accountability. Certainly, judges must be accountable—on this point Professor Burbank and I agree. But accountable to whom or to what? As we navigate this important question, I find many areas of agreement with Professor Burbank. But our areas of disagreement are important enough that I felt compelled to write this Essay.

Unlike Professor Burbank, the topic of judicial independence has not predominated my forty-five year career. Indeed, while a practicing lawyer, I probably accepted the notion as a given, without thinking. But upon becoming a judge, the importance of it hit me rather squarely as I listened to Justice Souter tell a story about a Russian lawyer who visited the Supreme Court. The lawyer was well versed in the history of the Court’s opinions and asked Justice Souter what he thought was the most important opinion of the modern Supreme Court. Justice Souter replied, as many of us would, that it was *Brown v. Board of Education*. Justice Souter could tell, however, that his answer disappointed the lawyer, so he asked which case the lawyer would have chosen. The Nixon tapes decision,<sup>2</sup> the lawyer responded, because in his country it was unheard of that a court could tell the head of state what to do.

Justice Souter said that, upon hearing this, he had “an epiphany”: we don’t teach our children civics; we don’t teach them how unique our system really

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<sup>1</sup> Stephen B. Burbank, *Reconsidering Judicial Independence: Forty Years in the Trenches and in the Tower*, 168 U. PA. L. REV. ONLINE 18, 25 (2019).

<sup>2</sup> *United States v. Nixon*, 418 U.S. 683 (1974).

is; and we don't teach them how it is designed to give judges the independence to make the tough calls without fear of retribution. At that moment, I too had an epiphany, and I resolved to spend my judicial career—and my bully pulpit as First Lady of Pennsylvania—trying to educate our children about ways in which the Framers crafted a form of government that has been the envy of the world and, indeed, has been emulated by many nations over the years.<sup>3</sup>

Let's jump right in, then, to the concept of judicial independence, and Professor Burbank's insightful essay. Judicial independence, as I intend to use it, describes a state of affairs whereby judges are free to decide cases in accordance with the rule of law. Many definitions have been provided for "rule of law." But the heart of the principle is that "people in positions of authority should exercise their power within a constraining framework of well-established public norms rather than in an arbitrary, *ad hoc*, or purely discretionary manner on the basis of their own preferences or ideology."<sup>4</sup> Thus, the judge's role in a society governed by rule of law is to be a mere mouthpiece for the law. As Professor Herbert Wechsler stated, "A principled [legal] decision . . . rests on reasons with respect to all issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved."<sup>5</sup> In other words, judicial decisions must be grounded in the well-established, neutral principles in a judge's toolkit, such as fidelity to the laws as passed by Congress, adherence to precedent, and our commitment to deciding only the particular case and controversy before us.

So, where does judicial accountability fit in? Professor Burbank suggests, as I understand his reasoning and decades of writings on the subject, that accountability requires the judiciary to be responsible to others: "to the public, . . . to the people's representatives, . . . [and] to courts and the judiciary as an institution."<sup>6</sup> Given this understanding of independence and accountability, I must part ways with his belief that judges should be accountable to external actors: the citizens and their representatives. This is not to say that I believe judges should ignore all citizens, including the litigants in our courts. Far from it. We owe a certain *duty* to citizens: that we give our full attention to each case, that we take every argument seriously, that we treat the pro se litigant no differently from the client with counsel at a prestigious law firm, and that we explain our decisions in a way that is

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<sup>3</sup> See generally, e.g., GEORGE BILLIAS, AMERICAN CONSTITUTIONALISM HEARD ROUND THE WORLD, 1776–1989: A GLOBAL PERSPECTIVE (2009) (describing the global influence of American constitutionalism).

<sup>4</sup> Jeremy Waldron, *The Rule of Law*, STAN. ENCYCLOPEDIA PHIL. (June 22, 2016), <https://plato.stanford.edu/entries/rule-of-law/> [<https://perma.cc/8ELU-XCQA>].

<sup>5</sup> Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959).

<sup>6</sup> Burbank, *supra* note 1, at 25.

accessible to nonlawyers. This moral and ethical duty, however, is different from *accountability*, which involves being answerable to someone or something.

To my mind, our accountability as judges starts and ends with fealty to the rule of law. Therefore, accountability, as I understand it, comes from within—within the Third Branch, on an institutional level, and within the minds of individual judges, on a personal level. Some of these internal accountability measures are formal: The system of appellate review holds district courts accountable to appellate courts;<sup>7</sup> appellate judges decide cases in panels to ensure one judge does not hold the exclusive power of review;<sup>8</sup> the Code of Judicial Conduct ensures judges act appropriately and avoid the appearance of impropriety;<sup>9</sup> and the Committees of the Judicial Conference of the United States offer guidance and assistance if issues of ethics or disability arise.<sup>10</sup> There are also a slew of informal accountability measures, such as our self-imposed commitment to follow precedent and to support our orders with thorough, reasoned opinions. These intrabranched measures, as Professor Burbank describes them, ensure that judges maintain decisional independence and apply the rule of law consistently.

Calls for external accountability, however, often arise from a fear that judges are mere “politicians in robes.” That is the notion that, when given the opportunity, judges will decide a case based on their political agendas rather than any neutral principles of the rule of law. It is not difficult to see why this view has spread. There can be no doubt that the judiciary is a part of the political discourse today in a way that it hasn’t been in the past. Candidates for office vow to nominate or confirm certain judges with particular interpretive ideologies or even particular views on cases. Officeholders bring lawsuits to further their political agendas and criticize or praise the courts depending on the outcome. And the media often frames judicial decisions, first and foremost, as a “win” or a “loss” for the political parties. Although I do not interpret Professor Burbank’s article to suggest that such concerns animate the judiciary, those concerns inevitably give rise to calls for *more* accountability, especially calls for accountability to the people and their representatives.

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<sup>7</sup> 28 U.S.C. §§ 1254, 1291 (2018).

<sup>8</sup> *Id.* § 46.

<sup>9</sup> JUDICIAL CONFERENCE OF THE U.S., CODE OF CONDUCT FOR UNITED STATES JUDGES (2019), [https://www.uscourts.gov/sites/default/files/code\\_of\\_conduct\\_for\\_united\\_states\\_judges\\_effective\\_march\\_12\\_2019.pdf](https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf) [<https://perma.cc/Q6P6-KEHQ>].

<sup>10</sup> *See generally* JUDICIAL CONFERENCE OF THE U.S., PUBLISHED ETHICS ADVISORY OPINIONS (2019) (compiling the published advisory opinions of the Judicial Conference’s Committee on Codes of Conduct). For more information about the Judicial Conference, see *About the Judicial Conference*, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference> [<https://perma.cc/V2L2-JNNP>] (last visited Nov. 10, 2019).

I hope to accomplish four things with this essay. *First*, I want to suggest that fears of a hyperpartisan judiciary are misplaced. Despite conventional wisdom, in the overwhelming majority of cases judges do their level best to resolve issues based on the rule of law, not in a way that promotes an agenda. *Second*, the current internal accountability measures in place give judges the independence to make tough decisions while also fostering accountability to the rule of law. *Third*, calls for new, external accountability measures, especially those that would have judges more responsive to public opinion or Congress, are misplaced and more likely to erode judicial independence than to strengthen it. And *fourth*, to the extent there is a fear that judges are mere politicians in robes, we all, as citizens of the United States, need to make a more concerted effort to understand and explain the role of the judiciary in our constitutional system and not undermine its independence. Rather than calls for more accountability, the goal should be to highlight the accountability measures already in place, emphasize the role of the judges and their fealty to the rule of law, and promote respect for our judicial institutions.

#### I. POLITICIANS IN ROBES?

I'll start with the elephant in the room: the widespread belief that judges are merely politicians in robes. I am not suggesting that Professor Burbank takes such a dim view of judges. But it is important to address it for two reasons: First, the notion of judges-as-politicians is widespread in our body politic; and second, our assessment of the truth of this notion has deep implications for our discussion of judicial independence and judicial accountability. If judges really are politicians in robes, then that would be an excellent reason to increase their accountability to the political branches and to the people. But if judges are, in fact, neutral arbiters—much like umpires calling balls and strikes, as Chief Justice Roberts has said<sup>11</sup>—then increased accountability may only serve to inject politics into a body that is otherwise independent from those forces. As I will demonstrate, the narrative—some call it the “attitudinal model”<sup>12</sup>—that judges make decisions based on their political preferences is not accurate in the vast majority of cases.

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<sup>11</sup> See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.) (“Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role.”).

<sup>12</sup> See, e.g., JEFFREY SEGAL & HAROLD SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86 (2002) (“[The attitudinal] model holds that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices.”).

Let's start by considering a few statistics. In 2018, 358,563 cases (both criminal and civil) were filed in the U.S. district courts.<sup>13</sup> For most cases, the district court is the first and last stop in the litigation; the controversy is resolved—by way of a settlement, a pretrial motion, or a trial—and the parties decline to take an appeal.<sup>14</sup> Only in approximately 10% of these cases do the parties decide to take an appeal to a U.S. Court of Appeals.<sup>15</sup> But even in those cases—cases which often present difficult or new legal issues—over 95% are resolved unanimously by three judge panels.<sup>16</sup> Whether the judge was appointed by Presidents Trump, Obama, Bush, Clinton, Bush, or Reagan (and we have judges appointed by all of these presidents on the Third Circuit), they agree with each other a remarkable 95% of the time.

What remains are the true puzzles. And the Supreme Court takes about seventy of these puzzles from the federal appeals courts every year (seventy-two in the most recent term, October 2018).<sup>17</sup> But even the cases before the Supreme Court are not nearly as partisan and political as one might expect. Take, for example, the most recent term. Nearly half of the cases decided were either 9–0 or 8–1.<sup>18</sup> And of those, 38% were decided unanimously.<sup>19</sup> In fact, 9–0 was easily the most common vote alignment this term.<sup>20</sup> This is remarkable. Of the nearly 400,000 federal cases filed every year, only approximately 70 make it to the Supreme Court—roughly 0.0175% of cases

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<sup>13</sup> *Federal Judicial Caseload Statistics 2018*, U.S. COURTS, <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018> [https://perma.cc/8QT7-XHRS] (last visited Nov. 10, 2019).

<sup>14</sup> *Id.*

<sup>15</sup> In 2018, there were 37,596 criminal and civil appeals filed in the U.S. Courts of Appeals. *Id.* To be sure, the appeals filed in 2018 are, generally speaking, not appeals from cases filed in district court in the same year. But it does give us a fairly accurate picture of the percentage of cases filed in District Court that are eventually appealed.

<sup>16</sup> See Christopher A. Cotropia, *Determining Uniformity Within the Federal Circuit by Measuring Dissent and En Banc Review*, 43 LOY. L.A. L. REV. 801, 815 (finding, from 1998 to 2009, that the six circuits surveyed had dissent rates ranging from 1.14% to 4.56%); Joshua B. Fischman, *Estimating Preferences of Circuit Judges: A Model of Consensus Voting*, 54 J.L. & ECON. 781, 782 (2011) (“In circuit courts, however, most cases are decided by consensus, with unanimity rates exceeding 95 percent in some circuits.”); see also Eugene Kiely, *Fact Check: Gorsuch’s Mainstream Measurement*, USA TODAY (Apr. 8, 2017, 1:38 PM), <https://www.usatoday.com/story/news/politics/2017/04/07/fact-check-gorsuch-mainstream-measurement/100164252/> [https://perma.cc/3YJD-A2NE] (“[Gorsuch] has voted nearly 99% of the time with the majority on the 10th U.S. Circuit Court of Appeals, and 97% of the court’s rulings were unanimous.”).

<sup>17</sup> ADAM FELDMAN, FINAL STAT PACK FOR OCTOBER TERM 2018 1, 30 (2019), [https://www.scotusblog.com/wp-content/uploads/2019/07/StatPack\\_OT18-7\\_30\\_19.pdf](https://www.scotusblog.com/wp-content/uploads/2019/07/StatPack_OT18-7_30_19.pdf) [https://perma.cc/YWM5-PQD3].

<sup>18</sup> *Id.* at 5.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

filed in the federal system.<sup>21</sup> Yet even among that tiny slice of cases—generally the toughest cases, ones in which several courts have typically weighed in and taken opposing views—nearly half are decided unanimously or near-unanimously. Perhaps our courts are not quite as divided as they may seem.<sup>22</sup>

To be sure, approximately a quarter of the Court’s cases were decided by that much-discussed 5–4 margin (although you’d think it would be much higher, given the attention those cases receive).<sup>23</sup> Still, those 5–4 cases do not always, or even usually, break down on the traditional “conservative”–“liberal” divide. Twenty-one cases this term were decided by a 5–4 margin.<sup>24</sup> And although the most common 5–4 majority featured the five “conservative” justices, we saw this lineup only seven times.<sup>25</sup> The other fourteen 5–4 lineups consisted of some scramble of the ideological spectrum.<sup>26</sup> For example, Justice Gorsuch joined the majority with Justices Ginsburg, Breyer, Sotomayor, and Kagan on four occasions.<sup>27</sup> And on another occasion, Justice Ginsburg added the fifth vote for a majority including Justices Thomas, Alito, Kavanaugh, and the Chief Justice.<sup>28</sup> Interestingly, in 5–4 cases, the four “liberal” justices formed a majority with one “conservative” justice more often (nine times) than the five “conservative” justices voted as a bloc (seven times).<sup>29</sup> And every “conservative” justice was, for at least one decision, the lone “conservative” justice with the four “liberal” justices.<sup>30</sup>

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<sup>21</sup> See U.S. COURTS, UNITED STATES DISTRICT COURTS – NATIONAL JUDICIAL CASELOAD FILE 2014–2019 (2019), [https://www.uscourts.gov/sites/default/files/data\\_tables/fcms\\_na\\_distprofile0930.2019.pdf](https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0930.2019.pdf) [<https://perma.cc/QKT7-LC5V>] (recording, on average, about 387,000 cases filed yearly, using September terms, in the federal district courts from 2014–2019).

<sup>22</sup> I am not the first to observe that our courts are less divided than they may seem. See, e.g., Max Bloom, *The Supreme Court Still Knows How to Find a Consensus*, NAT’L REV. (June 29, 2017, 4:00 PM), <https://www.nationalreview.com/2017/06/unanimous-supreme-court-decisions-are-more-common-you-think/> [<https://perma.cc/ESF7-RWU2>] (“The most recent term, in fact, was the least partisan since the middle of the 20th century. Over half of the cases were unanimous, and only 14 percent were decided by a 5–3 or 5–4 split.”); Sarah Turberville & Anthony Marcum, *Those 5–4 Decisions on the Supreme Court? 9 to 0 is Far More Common*, WASH. POST (June 28, 2018, 6:00 AM), <https://www.washingtonpost.com/news/posteverything/wp/2018/06/28/those-5-4-decisions-on-the-supreme-court-9-0-is-far-more-common/> [<https://perma.cc/QL7P-TDZ8>] (“According to the Supreme Court Database, since 2000 a unanimous decision has been more likely than any other result—averaging 36 percent of all decisions.”).

<sup>23</sup> See FELDMAN, *supra* note 17, at 5 (finding 29% of cases in the October 2018 term were decided 5–4); see also Turberville & Marcum, *supra* note 22 (finding that 19% of cases were decided 5–4 from 2000 to 2018).

<sup>24</sup> FELDMAN, *supra* note 17, at 5.

<sup>25</sup> *Id.* at 5, 19.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

Although the judges-as-politicians narrative may feel like a convenient, tidy way to explain judicial decisions, we see that it does not pass muster when subjected to close scrutiny. Granted, these are just statistics, and they do not tell the full story. But they do help place the narrative of a hyperpartisan judiciary into a better perspective.

And yet there are a few cases each year in which Supreme Court Justices are starkly divided, deciding issues where the terrain has been less travelled and the societal stakes are high. These are areas where not only is there often no controlling law, but there are strongly divergent views among the populace as to the desired outcome. But in these cases, the role of the judge is the same, although perhaps more difficult and controversial: that is, to rule analytically and not viscerally. Would we say that in these few cases they should somehow be accountable to the people for these rulings, or should we be content that they are adhering to legal principles, although disagreeing as to which ones trump others, in a sincere attempt to find the right result? I suggest the latter.

In my experience on the Third Circuit, even the sharpest disagreements I've had with my colleagues were grounded in competing views of the facts and the law; they were not political or agenda-driven. I am reminded of an appeal that came before a panel that included myself and then-Judge Sam Alito, *Mellott v. Heemer*.<sup>31</sup> That case involved the government's attempt to evict a family, the Mellotts, living in a rural area of Pennsylvania.<sup>32</sup> The Mellotts had resisted numerous court orders and were "holed up" in their farmhouse, reportedly with numerous firearms.<sup>33</sup> Several U.S. Marshals showed up with guns drawn and proceeded to force them out of their house at gunpoint.<sup>34</sup>

Judge Alito and the other panel judge viewed this as appropriate police conduct as a matter of law.<sup>35</sup> I, on the other hand, viewed it as involving force that a jury could find to be excessive.<sup>36</sup> Was this political and predictable? Well, it was perhaps predictable but not political. We were each viewing the scene as our backgrounds might predict—Judge Alito had been a prosecutor and could empathize with the sheriffs who were uncertain of what they might encounter out in the middle of nowhere; I, on the other hand, had been a bankruptcy lawyer and had seen people being evicted and understood their plight and their relative powerlessness at the hands of the government. I like

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<sup>31</sup> 161 F.3d 117 (3d Cir. 1998).

<sup>32</sup> *Id.* at 119.

<sup>33</sup> *Id.* at 119-20; *see id.* at 126 (Rendell, J., dissenting) (describing the precedent relied upon by the majority, which "involved the propriety of the arrests of individuals wanted for assault, holed up in a home in an otherwise peaceful seashore community, and the extent of force employed by teams of law enforcement").

<sup>34</sup> *Id.* at 120-21 (majority opinion).

<sup>35</sup> *Id.* at 123-25.

<sup>36</sup> *Id.* at 125, 127.

to think that our difference of opinion was not because he had a conservative agenda and I a liberal one. No, his mind's eye drew a very different picture from mine. While the public might think that judicial rulings are outcome determinative, and judges come to a case with an agenda, I have not found that to be the case. If we can understand why two people react differently when presented with a Rorschach test, we should be able to accept the premise that differences between how judges view situations can be as easily explained by experiences and influences in their lives as by "political" views or "agendas."

## II. CURRENT ACCOUNTABILITY MEASURES

Before we begin to consider whether *more* accountability is needed in the judiciary, it is helpful to review what measures are already in place. First and foremost, there are the measures embodied in the text of the Constitution. These include life tenure, the prohibition on salary reductions, and the case and controversy requirement.<sup>37</sup> In their own ways, these measures advance the twin goals of independence and accountability (as I conceive of it). They ensure that judges are independent from political forces and accountable to the rule of law. We cannot overstate the importance of these provisions. As Judge Harvie Wilkinson put it, "The contention that life tenure is unimportant would be made, if at all, only by someone who had never experienced the alternative."<sup>38</sup> Moreover, the case and controversy requirement, although discussed less in the popular discourse than life tenure, is just as important. We do not seek out cases to decide. We are confined to the controversy before us, but the converse is also true. We *must* resolve the particular case and controversy before us. And in doing so, we endeavor to write narrowly, avoiding constitutional issues if possible. As I wrote earlier this year, speaking for the Third Circuit on a case that had important public policy implications: "In resolving the discrete legal question before us, . . . we make no judgment as to the merits of this policy dispute. Rather, our role is more confined, and our focus is only on the legality of the particular action before us."<sup>39</sup> This approach keeps our focus squarely on the rule of law, even when politics loom large in a particular case.

Moving on to the nonconstitutional formal accountability measures, our system of judicial review is designed to ensure a judge cannot "go rogue." First, the district court renders a decision that is subject to appellate review.<sup>40</sup> That means after a district judge decides a case, a new set of fresh eyes, usually

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<sup>37</sup> U.S. CONST. art 3, §§ 1, 2.

<sup>38</sup> J. Harvie Wilkinson III, *The Role of Reason in the Rule of Law*, 56 U. CHI. L. REV. 779, 782 (1989).

<sup>39</sup> *City of Philadelphia v. Att'y Gen. of U.S.*, 916 F.3d 276, 279 (3d Cir. 2019).

<sup>40</sup> 28 U.S.C. § 1291 (2018).



three sets, will review the decision. Such a review is intended to correct any ruling that may have been simply wrong as a matter of law under a de novo standard or constituted an abuse of discretion. If the case is of particular importance, the full appellate court may hear it.<sup>41</sup> While the number of judges varies from court to court, on the Third Circuit, that means fourteen judges would then review the decision. That decision can then be the subject of a petition for review to the United States Supreme Court,<sup>42</sup> where, if granted, another nine judges will review the decision. As noted above, the fact that the vast majority of cases in both the appellate courts and the Supreme Court are decided unanimously suggests that any fear of judges running amok is misplaced and that our system is doing a good job of keeping judges accountable while maintaining independence.

We also abide by a Judicial Code of Conduct.<sup>43</sup> The Code forbids “family, social, political, financial, or other relationships to influence judicial conduct or judgment.”<sup>44</sup> The Code also “provide[s] standards of conduct for application in proceedings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980.”<sup>45</sup> Far from a toothless vessel, the Code is the benchmark to which judges will ultimately be held if a misconduct complaint is filed.<sup>46</sup> The Code is only strengthened by our operating procedures: our recusal procedures provide an opportunity for judges to ensure they won’t find themselves in a position in which their impartiality may be questioned.<sup>47</sup> Judicial independence is best served when we hold ourselves accountable; these formal procedures do exactly that.

And, perhaps most importantly, there are the informal norms that, as judges, we dedicate ourselves to follow. I’m reminded of a time I was once asked by a fourth grade student, “Is judging what you do, or is it who you are?” It might be the most perceptive question I have ever been asked. Surely, the answer is: the latter. Before taking the bench in 1994, I had practiced law for twenty-one years and interacted with judges professionally and socially. Yet, I had no idea how seriously judges take their roles—and responsibility—

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<sup>41</sup> FED. R. APP. P. 35(a).

<sup>42</sup> 28 U.S.C. § 1254.

<sup>43</sup> JUDICIAL CONFERENCE OF THE U.S., *supra* note 9.

<sup>44</sup> *Id.* at Canon 2(B).

<sup>45</sup> *Id.* at Canon 1, cmt.

<sup>46</sup> *See* 28 U.S.C. § 351(a) (“Any person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts . . . may file with the clerk of the court of appeals for the circuit a written complaint . . .”).

<sup>47</sup> *See* U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, INTERNAL OPERATION PROCEDURES OF THE U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT 11.1.1 (2018) (“Before cases are sent to a panel, the clerk transmits copies of the docket sheets and disclosure statements to each judge who responds promptly informing the clerk of those cases in which the judge is recused.”).

as judges and how deeply their fealty to the rule of law runs. How could I not have known this? Because I had never been a judge. That is not just what we do, it is who we are. We are mere mouthpieces for the rule of law. As I envision it, we try not to let ourselves get in the way of the law. I am sure that members of the other branches of government must feel a similar weight of responsibility to the electorate and take their roles seriously as well. But the judiciary is singularly faithful to an ideal—the rule of law—and along with it, its consistency and its perceived fairness.

One of the most important informal constraints is, as Judge Wilkinson has put it, our “accountability to reason.”<sup>48</sup> As judges we issue orders, but we must explain those orders with reasoned opinions. Those opinions are subject to criticism from a variety of sources, including a higher court, a dissenting colleague, and members of the legal academy. Judges are sensitive to criticism that their opinions are not tightly reasoned and endeavor to ensure that their opinions are airtight. Indeed, in my experience, my colleagues and I have often decided, after coming to a conclusion about a case, that the opinion “won’t write.” That is, although we had agreed upon a certain outcome at conference, we found that, after putting pen to paper, the conclusion could not be supported by the law. In these circumstances, we don’t just forge ahead with an unsupported conclusion—we change course. This is what Judge Frank Coffin was referring to when he wrote that “[t]he act of writing tells us what was wrong with the act of thinking.”<sup>49</sup>

Another area which exemplifies our self-imposed accountability to the rule of law is our commitment to following precedent. Nothing prevents a district judge from casting aside precedent (although the judge would almost certainly be reversed on appeal). And nothing stops a three-judge panel from rewriting the circuit’s law (although the panel, too, would almost certainly be reversed if the case proceeded to be heard by the full court en banc). But judges follow precedent nonetheless. To be sure, the threat of reversal plays a role; no one likes being reversed. But our reasons for following precedent run deeper than that. Of the foremost maxims of the rule of law are publicity, clarity, and stability.<sup>50</sup> Following precedent furthers all three: untethered from precedent, the law would lose its stability, potentially oscillating in meaning from opinion to opinion. Vacillating interpretations, in turn, prevent the law from having a clear meaning. Thus, its true content would be unknown, indeed unknowable,

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<sup>48</sup> Wilkinson, *supra* note 38, at 781.

<sup>49</sup> FRANK M. COFFIN, *THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH* 57 (1980); *see also* Wilkinson, *supra* note 38, at 798 (“Nothing in the Constitution requires the written justification of judicial decisions, but a judiciary accountable to reason cannot resort to arbitrary acts.”).

<sup>50</sup> *See* Waldron, *supra* note 4.

to the public. When the public cannot determine what the law is, it cannot modify its behavior in accordance with it, and the rule of law crumbles. Although the Supreme Court is not “bound” by precedent in the way we are, and can overrule a prior decision, it does so sparingly, as the same reasons we follow precedent underpin the high court’s doctrine of *stare decisis*.<sup>51</sup>

Another way of looking at our practice of following precedent is that it is an act of judicial humility. It is a recognition that we (either a single district court or a panel of judges) should not start from first principles in every case. We must stand on the shoulders of those who came before us—we must rely on, and build on, their wisdom. One of our most eminent Founding Fathers, James Wilson, recognized this when he wrote: “[A] judge . . . should bear a great regard to the sentiments and decisions of those, who have thought and decided before him.”<sup>52</sup> Wilson was writing about common law judges in particular,<sup>53</sup> but his rationale applies to our modern federal courts as well. By building on the decisions that came before us—strengthening and clarifying them to the best of our ability and correcting errors when necessary—we engage in a collective effort to strengthen the rule of law.

Rather than a reason to call for external accountability, differences of opinion and perspectives are aspects of our system that we should recognize as features—not flaws—in the system. When you think about it, diversity of views (as opposed to adherence to King George’s dictates) makes our country what it is today.

### III. THE PERILS OF INCREASED ACCOUNTABILITY TO POLITICAL ACTORS

Any criticism of an independent judiciary must offer some alternative. It is not enough to say that an independent judiciary is not perfect. It is not. But humans are not perfect. And thus no institution left to the hands and minds of mere mortals will be perfect. Any criticism of an independent judiciary must demonstrate, then, how another way—e.g., a judiciary that is more accountable to Congress or the people—will be better. A good start would be: show me an example of an “accountable” judiciary that is better than our independent judiciary. I, for one, cannot find one. But by looking to history, to other nations, and to various state governments in the United States, I can quite easily find “accountable” judiciaries that exhibit serious problems.

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<sup>51</sup> “[S]tare decisis is a foundation stone of the rule of law, necessary to ensure that legal rules develop ‘in a principled and intelligible fashion.’” *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014) (emphasis omitted) (citing *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986)).

<sup>52</sup> 2 THE WORKS OF JAMES WILSON 198 (James DeWitt Andrews ed., 1896).

<sup>53</sup> *Id.*

Let's start with our history. Judicial independence, to the American mind, can be taken for granted as a fixed star of our constitutional order. This is not surprising, as we've been blessed with an independent judiciary for over 200 years. But the history of our nation is still young, at least relative to the history of civilized human life. When we step back for a broader perspective we see that our 230-year experiment with an independent judiciary is just that—an experiment. Indeed, it is the exception to the much darker and troubling rule: the arbitrary exercise of government power. And we see that even at the time of the American founding, despite thousands of years of significant developments in the law, the concept of an independent judiciary was still in its infancy, if it existed at all.

The British made major strides toward an independent judiciary with the Act of Settlement 1701, which provided that judges' commissions would be valid during good behavior.<sup>54</sup> But Parliament remained sovereign, and thus could dominate the judiciary; and good-behavior tenure did not carry over to the colonies, where judges were appointed by the crown, paid by the crown, and served at the pleasure of the crown.<sup>55</sup> Thus, the mix of accountability and independence was vastly different from what we have today: judges were much more accountable to political actors, less accountable to the rule of law, and had very limited independence. Historian Gordon Wood writes that judges at this time were regarded as "lesser magistrates tied to the governors or chief magistrates."<sup>56</sup> Indeed, legal training was not viewed as a necessary condition to attaining a judicial position: "Thomas Hutchinson of Massachusetts, for example, who was no lawyer, was in the 1760s chief justice of the superior court, lieutenant governor, a member of the council, and judge of probate Suffolk County all at the same time."<sup>57</sup> Not exactly an independent judiciary.

What were the results of this arrangement? Most importantly, trust in judicial officers was abysmal, as the people did not believe that judges could act in an independent and impartial manner. Thomas Jefferson, for example, remarked in 1776 that the actions of judges had been "the

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<sup>54</sup> See Act of Settlement 1701, 12 & 13 Will. 3 c. 2, § 3 (Eng.) ("[J]udges commissions be made quamdiu se bene gesserint, and their salaries ascertained and established; but upon the address of both houses of parliament it may be lawful to remove them.").

<sup>55</sup> See John D. Ferrick, *Impeaching Federal Judges. A Study of the Constitutional Provisions*, 39 *FORDHAM L. REV.* 1, 9-10 (1970) ("From the earliest days, judges were appointed by the Crown and given 'patents' which fixed their terms.").

<sup>56</sup> Gordon S. Wood, *Comment*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 49, 54 (Amy Gutmann ed., 2018).

<sup>57</sup> *Id.* at 55.

eccentric impulses of whimsical, capricious designing [men].”<sup>58</sup> The House of Massachusetts declared that any judge who accepted his salary from the crown “has it in his heart to promote the establishment of an arbitrary government in the province.”<sup>59</sup> And, in the end, this distrust helped spur the colonists to revolution.

Fast forwarding to today, we can look around the world and see the perils of a judiciary that is accountable to external actors. In China, judicial independence isn’t just missing, it isn’t seen as desirable. Zhou Qiang, the President of the Supreme People’s Court, recently urged his fellow citizens to “bare your swords towards false western ideals like judicial independence.”<sup>60</sup> And in Russia, Freedom House has noted that “[t]he judiciary lacks independence from the executive branch, and career advancement is effectively tied to compliance with Kremlin preferences.”<sup>61</sup> As a consequence, “[s]afeguards against arbitrary arrest and other due process guarantees are regularly violated” and “[p]rivate businesses . . . are routinely targeted for extortion or expropriation by law enforcement officials.”<sup>62</sup> These are the unfortunate consequences of a lack of judicial independence.

We need not venture that far to find disincentives to independence. Many state and county judges stand for elections. Thirty-eight states elect their supreme court judges.<sup>63</sup> It is not that elected judges do not take their role and responsibilities seriously, but it must be more difficult to be independent when forces other than the discrete law and facts before you—which could cause you to lose your job at the next retention election—are at play. Candidates for judicial elections, for example, will often be the target of television ads suggesting they are too “soft on crime.”<sup>64</sup> Many ads attack judges for *specific* decisions they made.<sup>65</sup> As a result, studies have shown that elected trial judges will issue more punitive sentences and

<sup>58</sup> Letter from Thomas Jefferson to Edmund Pendleton (Aug. 26, 1776), in 1 THE PAPERS OF THOMAS JEFFERSON 505 (Julian P. Boyd et al. eds., 1950).

<sup>59</sup> BERNARD BAILYN, IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 108 (Belknap Press 1992) (1967).

<sup>60</sup> Lucy Hornby, *China’s Top Judge Denounces Judicial Independence*, FIN. TIMES (Jan. 17, 2017), <https://www.ft.com/content/60ddd46-dc74-11e6-9d7c-be108f1c1dce> [<https://perma.cc/CEM2-H63B>].

<sup>61</sup> *Freedom in the World 2019: Russia*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/2019/russia> [<https://perma.cc/A4RM-24H6>] (last visited Nov. 10, 2019).

<sup>62</sup> *Id.*

<sup>63</sup> ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, WHO PAYS FOR JUDICIAL RACES? 1 (2017), [https://www.brennancenter.org/sites/default/files/publications/Politics\\_of\\_Judicial\\_Elections\\_Final.pdf](https://www.brennancenter.org/sites/default/files/publications/Politics_of_Judicial_Elections_Final.pdf). [<https://perma.cc/LTZ5-TZLT>].

<sup>64</sup> KATE BERRY, BRENNAN CTR. FOR JUSTICE, HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES 3-4 (2015), [https://www.brennancenter.org/sites/default/files/publications/How\\_Judicial\\_Elections\\_Impact\\_Criminal\\_Cases.pdf](https://www.brennancenter.org/sites/default/files/publications/How_Judicial_Elections_Impact_Criminal_Cases.pdf) [<https://perma.cc/2ZJW-8PYC>].

<sup>65</sup> *Id.*

elected appellate judges will be less likely to rule in favor of a criminal defendant during an election year.<sup>66</sup> Such a system of accountability to the people has a clear negative effect on the independence of the judiciary.

Therefore, perhaps we should zealously guard the federal court system we have, rather than risk weakening the judiciary's independence with the addition of new, external accountability. Our system has allowed our society to reap the benefits of an independent judiciary. Much has been written about the judiciary's role in holding public actors to account; an independent judiciary is a bulwark against the arbitrary exercise of power, a protection for civil liberties, and a check on public corruption. But judicial independence also has an enormous effect on private law and, consequently, economic development.<sup>67</sup> Indeed, studies have shown that "[t]he degree of judicial independence is correlated with economic growth."<sup>68</sup> Aside from the wealth of empirical evidence for this claim, it also makes intuitive sense. If you are starting a business—and, thus, need to rent or buy property and equipment, hire a workforce, obtain a patent, or gain regulatory approval for your enterprise—your chances of prospering are greater if you live in a country in which the courts have clear, established practices for interpreting legal questions, its rulings are to some degree timely and predictable, and you can expect a ruling free of interference from political forces. Moreover, the mere presence of such a functional system causes the citizenry to abide by the laws for the most part; the courts are there to resolve disputes or enforce compliance when needed. Our judicial system is by no means perfect, but the United States has consistently ranked near the top of the world for ease of doing business—a ranking that is to a large extent powered by the strength of our judicial system.<sup>69</sup>

#### IV. THE NEED FOR GREATER CIVICS EDUCATION

While all of the above measures are well and good, there is obviously a gap between what the judiciary does and how people perceive it, which leads

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<sup>66</sup> *Id.* at 7-9.

<sup>67</sup> See generally, e.g., Randall T. Shepard, Introduction, *The Judiciary's Role in Economic Prosperity*, 44 IND. L. REV. 987, 992 (2011) (arguing that to contribute to the economy and job growth, "[c]ourts must maintain their independence and impartiality" and "lay down the clearest rules possible and then follow them in a predictable way so that businesses can plan their affairs").

<sup>68</sup> Kenneth Dam, *The Judiciary and Economic Development* 1 (John M. Olin Law & Econ. Working Paper No. 287, 2006), <https://www.brookings.edu/research/the-judiciary-and-economic-development/> [<https://perma.cc/2J9Y-YU7T>].

<sup>69</sup> See WORLD BANK GRP., DOING BUSINESS 2020, at 4 tbl.o.1, 33 (2019) (ranking the United States sixth in the world in terms of ease of doing business and noting that "[j]udicial efficiency is essential to firm productivity").

to confusion and resulting calls for external accountability. I believe the problem lies in a failure to properly teach what the courts do and how they do it. In 2016, the Annenberg Public Policy Center found that only 26% of Americans could name the three branches of the federal government.<sup>70</sup> Two years hasn't had us fare much better: in 2018, only 32% knew all three branches, and 33% could not name a single branch.<sup>71</sup> While most states require a civics course in high school, no states course exceeds one year, and thirty-one states only require a half-year of civics education.<sup>72</sup> Perhaps unsurprisingly, surveys show that significant knowledge of civics and the workings of the Supreme Court leads to a greater willingness to protect the Supreme Court's decisional independence.<sup>73</sup> As Kathleen Hall Jamieson, director of the Annenberg Public Policy Center, has noted,

The survey shows the important role that understanding of the Constitution plays in the public's support for an independent judiciary. But it is worrisome both that 1 in 5 [citizens surveyed] would consider doing away with the Supreme Court if it were to issue a lot of unpopular decisions and that 1 in 4 think it would be OK for Congress to strip jurisdiction from the [C]ourt in instances in which it disagrees with the [C]ourt's ruling.<sup>74</sup>

I fear that these results stem from a lack of genuine understanding as to how we decide cases. Our role is not to do the will of the people; that's Congress's job. We do not concern ourselves with whether our rulings are popular, but, rather, whether they are faithful to precedent and the law as it is and should be.

So, we need to do better. We need to teach our children about our system and how the independence of the judiciary is a valued, animating principle that must be preserved and protected. We judges need to be clearer in explaining what we are deciding and why we are deciding a case a certain way. Our opinions are, for the most part, well reasoned, but we need to make our opinions transparent and more easily understandable to the average citizen and the media who report on them. And we need the

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<sup>70</sup> *Americans' Knowledge of the Branches of Government Is Declining*, ANNENBERG PUB. POL'Y CTR. (Sept. 13, 2016), <https://www.annenbergpublicpolicycenter.org/americans-knowledge-of-the-branches-of-government-is-declining/> [<https://perma.cc/Y7WP-PKDU>].

<sup>71</sup> *Civics Knowledge Predicts Willingness to Protect Supreme Court*, ANNENBERG PUB. POL'Y CTR. (Sept. 13, 2018), <https://www.annenbergpublicpolicycenter.org/civics-knowledge-survey-willingness-protect-supreme-court/> [<https://perma.cc/N7EU-KZS7>].

<sup>72</sup> CATHERINE BROWN & SHARAH SHAPIRO, CTR. FOR AM. PROGRESS, *THE STATE OF CIVICS EDUCATION* 5-6 (2018), <https://www.americanprogress.org/issues/education-k-12/reports/2018/02/21/446857/state-civics-education/> [<https://perma.cc/3VGX-QXYU>].

<sup>73</sup> *Civics Knowledge Predicts Willingness to Protect Supreme Court*, *supra* note 71.

<sup>74</sup> *Id.*

citizenry to try to understand our rulings and the reasoning behind them and not criticize judges merely because they do not agree with the outcome of a particular case. And, yes, accountability that ensures adherence to the rule of law may well be the other side of the coin of judicial independence.

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