An Essay: Courts, Judicial Review and the Pursuit of Virtue

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Academic conferences are, thankfully, not occasions that generally inspire public displays of anger. Academics analyze, opine, observe, speculate, and call for further study; but, while capable of engaging in pitched battles when nothing entirely tangible seems at stake, academics mainly leave public anger to the more visceral strata of humankind, like trial lawyers.

Hence my problem. Twenty-five years of being a criminal trial lawyer cannot be wholly cancelled out by five years in academia. So, honored as I was by the invitation of Professor Robert Barker to participate in a conference on judicial review and, particularly, to comment on a presentation by Dr. Allan Brewer-Carías of Venezuela, I soon found the old wolf that prowls inside all trial lawyers rising and clearing his throat. He demands to let loose a howl of the kind not generally echoing off the walls where symposiums dwell.

Dr. Brewer, you see, is a first class academic, a man whose writings and beliefs have helped form his own nation's Constitution, a Constitution that may be enforced by the courts of his country in a multi-layered system of judicial review. He has never led an army in the field, never plotted the overthrow of anything other than bad ideas, and never sown the seeds of anything more than a desire that his nation enjoy the freedom its Constitution so earnestly promises. He carries no plastic explosives in his briefcase and his bank account does not burst with proceeds of funds stolen from his national treasury. He is an academic, a danger to anyone only insofar as his ideas may fire new policies blessed by the democratic processes that would give them life.

And yet, Dr. Brewer cannot go home.

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The government operating under his Constitution, subject to the judicial review powers of his courts, would arrest him if he tried. They would make him a martyr to Constitutional government instead of just the hero of it he is today. So, he cannot go home. And I am angry about that. And I want to know why. Mostly, I would like to ask here why systems that seem to have so much Constitutional government and the judicial review powers to enforce it on paper would allow such a thing to hang over its head or, for that matter, anyone else's. Obviously, having a Constitution and judicial review in theory is one thing; making it meaningful requires something more.

Finding out what that “more” is requires that I channel my anger to an effort at understanding judicial review at its most basic level. We need to start at the beginning.

Written Constitutions beget judicial review. They are the first laws, the core laws, principles deemed right, in part, because the people say they are right. But no matter how beautifully Constitutions are drafted, they are not self-effectuating. The people, whose authority those documents carry, are not a body in perpetual session, able to assemble regularly to correct or even identify transgressions of these highest principles.

Some body (or some group) has to be empowered to enforce that supreme law against the encroachment of other laws that have cropped up in the normal course of day-to-day governance. Since the supreme law is, by nature, supreme, the power to say that it overrides another law is the ultimate political power, the nuclear alternative, the big stick that one and only one combatant in a political brawl can wield.

Such a power is to be feared. It is final and reviewable only by the unusual and not oft-repeated actions of the people from whom the document sprang in the first place. But it is also inevitable. Once you have a written Constitution, declaring itself to be the Summa Lex, then the power of judicial review has to lie some-

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That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

*Marbury*, 5 U.S. at 176.
where. Its existence is a given; where it resides, however, is nego-
tiable.

In the United States, it is an article of faith that it lies in the
Supreme Court. But why do we place the nuclear alternative with
that body? I tell my students that a rough and unofficial categori-
zation of those reasons is as follows:

I. INSTITUTIONAL

A. *The Court is passive; cases come to it.*

The big stick should not be wielded by someone who can go out
whenever he wants in search of prey. As we speak, there are
probably hundreds of unconstitutional laws on the books, but until
some party challenges one and the Court overcomes its own rules
of self-restraint\(^2\) to accept the case, the laws remain. The Court
will not forage out, big stick in hand, to hunt them down. Institu-
tionally, that is a good thing.

B. *The Court is detached; it can see a law developed in the cruci-
ble of reality.*

Fears of a law's unconstitutionality at its enactment may dissi-
pate once the flesh of experience is placed on the bones of its lan-
guage, allowing the Court to withhold invoking the nuclear alter-
native in many cases. On the other hand, laws once thought be-
nign may prove particularly mischievous in actually undercutting
core principles, requiring the Court to place its finger on that nu-
clear button. In either case, reasoned restraint is well served.

C. *The Court is contemplative; it takes time to think.*

In the event that the Martians land and invade, courts would be
a terrible place to go for help. By the time briefing schedules and
conferences were held, we would all be compost in a Martian herb
garden. But, courts are very good when the passions of the mo-
moment clear and reflection of thought prevails over reaction of the
knee-jerk variety. The carrier of the big stick should be a thought-
ful fellow, not given to sudden rage.

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2. Here I think of standing, rules about cases deemed moot or not yet ripe, and the
political question doctrine. A bit of deeper reflection would add to this list the preference of
the Court to construe a statute in a way to avoid deeming it unconstitutional. See Jones v.
II. PROCEDURAL

This was Marshal’s view in Marbury. A court has to decide on constitutionality in a case where a party properly raises it as a defense to the application of a statute. In so doing, of course, a court must reverse a normal maxim of statutory construction. As Hamilton points out in Federalist No. 78, more recently passed acts normally amend and trump the old ones. This is not so if a Constitution is the older document and a mere statute is the new one. The Court must then, with reluctance, use a power procedurally thrust upon it.

III. POLITICAL

The Court and our Framers constantly tell us that, the Bill of Rights notwithstanding, the twin structural pillars of personal freedom are separation of powers and federalism. Even so junior a political scientist as myself knows that these are conflict model devices and that conflict models need some form of external control to be effective. Why?

A. The players in the political game must be made to play by the rules.

Anyone who has ever played pick-up basketball knows that where the outcome of the game holds a lesser priority to the mere act of playing, enforcement of the rules by the honor system is perfectly adequate. However, where the outcome achieves preeminent importance, a neutral arbiter is needed to give the outcome legitimacy. As the game of politics always involves outcomes of

3. Marbury, 5 U.S. at 137. He argued:
   It is emphatically the province and duty of the judicial department to say what
   the law is. Those who apply the rule to particular cases, must of necessity ex-
   pound and interpret that rule. If two laws conflict with each other, the courts
   must decide on the operation of each.

   So if a law be in opposition to the constitution; if both the law and the consti-
   tution apply to a particular case, so that the court must either decide that case
   conformably to the law, disregarding the constitution; or conformably to the
   constitution, disregarding the law; the court must determine which of these
   conflicting rules governs the case. This is of the very essence of judicial duty.
   Id. at 177-78.

4. The Federalist No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., Signet
   Classic 2003).

5. Bruce A. Antkowiak, Contemplating Brazilian Federalism: Reflections on the Prom-
   ise of Liberty, 43 DUQ. L. REV. 599 (2005). In this article emanating from the Law School's
   conference on Federalism in the Americas . . . and Beyond, I set out considerable documenta-
   tion for this point.
consummate importance, a referee is a top priority. If a law was put into effect with only the vote of one house, or if the President decided that under Article 2 he could seize a steel mill or tap everyone's phone, some neutral party has to step in and call a foul, saying, in effect, you did not follow the rules of the political game and for that reason your action cannot be afforded the honorable title of law.

B. Moreover, the political game can have devastating effects on those marginal members of society who can never get to play but whose interests in not being oppressed by those who do are most palpable.

Every member of Congress could agree that those who dissent from a President's asserted power to tap phones should be sent to internment camps until the war on terror is over. Someone reading our Summa Lex must step in and say that while the political process proceeded according to its internal rules, that outcome is one that Lex deems unconscionable. And the Court, with its lifetime appointments and its veneer of non-partisanship, seems the perfect referee in all respects.

So we have given the Court this fearful power, that big stick, and we seem to dwell in a euphoric haze that judicial review is mostly always a power wielded for good. But the power of judicial review is, like all power, in the strict sense, ethically neutral. The hammer that builds the home can bash the head of the homeowner. It would serve us to appreciate that our benign assumptions about the use of this power is a view neither universally held nor historically accepted without challenge.

In his scholarly presentation to this conference, Professor Brewer has pointed out that judicial review can be a powerful and diabolical instrument for authoritarianism. And, while Madison assured his readers that the federal government (Congress) would be held in check by a watchful judiciary, others writing at the same time vociferously disagreed.

The Anti-Federalists agreed with the Federalists that the proposed Constitution would necessarily create in one body a supreme authority to interpret the document to supersede the acts of

others and that the federal courts would be that body. They saw that, however, as a horrible thing indeed.

In a Letter to the Citizens of the State of New York in February, 1788, "Brutus" (New York State Judge Robert Yates) assumed that the federal judiciary would have the power to "explain the constitution, not only according to its letter, but according to its spirit and intention; and having this power, they would strongly incline to give it such a construction as to extend the powers of the general government, as much as possible, to the diminution, and finally to the destruction, of that of the respective states."8

He argued that the concentration of the power to liberally interpret the expansive language of congressional powers in Article 1, §8, and the Preamble (with powers granted generally to do things like "promote the general welfare") into a Judiciary that was itself part of the federal government, would portend the destruction of federalism.9 Because judges would have the power to interpret the Constitution "not only according to the natural and ob[vious] meaning of the words but also according to the spirit and intention of it" and would not be subject to anyone who could vote them out, they would enjoy a power beyond the Legislature, and be able to render the states "trifling and unimportant."10 Nothing, he said, could have been better conceived to facilitate the abolition of the states than the judiciary of the federal government.11

Give the power of judicial review to the legislators, Yates argued, since if they expanded federal power in an unruly way, they would do so at their peril on election day.12 Placing it in the courts, however, left only one, unpleasant, means of control:

But when this power is lodged in the hands of men independent of the people, and of their representatives, and who are not, constitutionally, accountable for their opinions, no way is left to control them but with a high hand and an outstretched arm.13

If we raised that hand and arm to strike down the courts, or to strip them of the power of judicial review, they would be singu-

9. Id. at 299-304.
10. Id. at 304, 307.
11. Id. 308-09.
12. Id. at 309.
13. THE ANTI-FEDERALIST PAPERS, supra note 8, at 309.
larly ill-equipped to fight back. When its orders are not the subject of voluntary assent, courts must look to the Executive for enforcement. But when, because they have lost the patina of public integrity we afford them, they must constantly rely on the Executive for that force, courts become mere handmaidens of the Executive, unworthy of the status of a co-equal branch of government.

Hamilton was certainly correct when he observed that with influence neither over the sword nor the purse, "[i]t may truly be said" that the judiciary has "neither force nor will but merely judgment . . . ." 14

But in a well-ordered society, one where innocent academics can go home, the power of judicial review surely cannot rest on the point of the Executive's bayonet. We may have given courts this power, but they must keep it by earning our faith in their ability to guard it well and use it wisely. The Court may not have force or will, but its judgments do have force to the degree they capture the will of the people whose Constitution they propound and protect.

There is one, fundamental and solemn way that courts may perpetually earn and justify their elevated position as the sole repositories of this nuclear alternative. There is something the courts must do for us in exchange for us not raising the high hand and outstretched arm, something we should demand as consideration for issuing that big stick.

Courts must earn our faith, and merit the retention of judicial review, by making their mission the pursuit of virtue.

By virtue, I do not mean merely the "uncommon portion of fortitude . . . to do their duty as faithful guardians of the Constitution" that Hamilton spoke of, 15 or John Adams's hope that judges be "men of learning and experience in the laws, of exemplary morals, great patience, calmness, coolness, and attention." 16 Rather, the virtue of which I speak is the kind described by Montesquieu in the Spirit of the Laws when he argued that in a successful tyranny, what must be cultivated in the people is the capacity for fear; in a monarchy, it must be a taste and capacity for honor; but

15. Id. at 468.
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For judges, the pursuit of virtue must be manifested by an effort to reach the foundation of our law, a foundation our Constitution reflects. Being a person of integrity is, or should be, the expected disposition of anyone honored by public service; commitment to the study, exposition and protection of the foundation of the law requires more. Such a commitment is, however, the least we should expect from those in whom we have entrusted the ultimate political power in a constitutional state.

Our law's foundation must be understood as having a deep philosophical core. The core was formed by our Framers and a vast number of the colonists with whom they shared at least two things: a communitarian spirit and a passion for the reading of law.

Edmund Burke, in addressing his colleagues in Parliament and warning of the forthcoming American Revolution, related that London booksellers claimed to have sold more books to the colonies than to all of Great Britain. A vast number of those books were law books, books that spoke of a deeply moral basis to law, a basis that required men to look beyond the mere words of positive law for the true source of legitimacy in reason, and from reason, to obtain a glimpse of natural law, the transcendent end of the lawmaker's journey.

The Enlightenment theory prevalent at the time spoke to conceptions of natural law that led the Colonists to believe they were all "tied to a proposition that a providential God had fitted us out to recognize principles of justice" through the capacity to reason.

Reason may have displaced an older, theological mandate as the philosophical force behind political society but it hardly stripped that society of its moral component; limited government did not mean an amoral one. Lockean notions of social contract, the rule of law and the pursuit of the common good were the products of reason but not ends in and of themselves. They were the frame-

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17. This rendering and much of the discussion that immediately follows is informed by Professor Daniel N. Robinson's wonderful lectures entitled "American Ideals: Founding a 'Republic of Virtue.'" DANIEL N. ROBINSON, AMERICAN IDEALS: FOUNDING A "REPUBLIC OF VIRTUE" (The Teaching Company 2004).
18. Id. at 14-15.
19. Id. at 15.
20. I have written about this more extensively in Judicial Nullification. Bruce A. Antkowiak, Judicial Nullification, 38 CREIGHTON L. REV. 545, 570-79 (2005).
work to allow for the pursuit of higher values and the tracking down of that most elusive of commodities, the truth.\textsuperscript{21}

The Framers read the sixteenth century theologian Richard Hooker who told them that “the spirit leadeth men into all truth” in one of two ways, “the one belonging but unto some few, the other extending itself unto all that are of God; the one that which we call by a special divine excellency \textit{Revelation}, the other \textit{Reason}.”\textsuperscript{22} They knew that Martin Luther had admonished that:

No matter how good and equitable the laws are, they all make exceptions of cases of necessity, in which they cannot be enforced. Therefore a prince must have the law in hand as firmly as the sword, and decide in his own mind when and where the law must be applied strictly or with moderation, so \textit{that reason may always control all law and be the highest law and rule over all laws}.\textsuperscript{23}

Positive laws of any kind would have intrinsic legitimacy only insofar as they “measure up correctly with reason itself.”\textsuperscript{24} The Constitution itself was seen as a written expression of a search for the best reason can give us. It also represented an ongoing mandate for that search that judges are bound to undertake as a necessary component of their institutional legitimacy.

Our Framers rejected the notion that judges are mere functionaries bound to apply laws with only a dictionary to guide them. They would have repudiated judges in Nazi Germany who, with shrugged shoulders, applied laws mechanically under the axiom “gesetz ist gesetz.”\textsuperscript{25} They would tell judges today that reading the words of the Constitution is the first, but only the first, aspect of the pursuit of virtue, which is the ultimate role of the Court.

Pursuing virtue means understanding that the Constitution is no mere law, enacted as a result of a particular and temporary political stimulus. While the Declaration of Independence was a statement of \textit{reasons} to break from Britain, the Constitution is a

\begin{itemize}
\item \textsuperscript{21} Id.
\item \textsuperscript{23} Martin Luther, \textit{Martin Luther: Selection From His Writings}, 393 (John Dillenberger ed., Anchor Press 1962) (emphasis added). John Calvin, too, had spoken of his philosophy in natural law terms, but not as merely a product of common reason; rather, it was “the voice of conscience.” Robert L. Reymond, \textit{John Calvin: His Life and Influence} 107 (Robert L. Reymond ed., Christian Focus 2004).
\item \textsuperscript{24} Robinson, \textit{supra} note 17, at 15.
\item \textsuperscript{25} “Law is law.” Id. at 45.
\end{itemize}
statement of reason, a moral judgment deriving from an attempt by citizens to use their self-evident capacity to reason to find a law of nature, a law of transcendent origin, a law true in good times and bad, in moments of calm and in moments of passion and turmoil. The Constitution embodies principles that are right not only because the People said they were right, but embodies those principles because they are right. They are right because they derive from a process that is the best one human beings can use to develop a system of self rule; a process that requires levels of thought beyond the cursory reading of words on a page; a process meant to last and outlast the societal nuances of a late eighteenth-century time capsule; a process that counsels that core beliefs of a reasoned people are not repudiated when wisdom gleaned from experience applies those beliefs in ways the passing of ancient prejudices heretofore have made impossible; a process that yearns for, and takes us as close as possible to, the permanent, transcendent truth our Framers so earnestly believed was there to find.

Hamilton thus could easily argue that “whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing Constitution” or where infractions “proceeded wholly from the cabals of the representative body”, 26 the Court has a mandate to step in and assert those principles and the reasoned process that brought them about. In so doing, the Court does not elevate itself over other political bodies; rather, it simply gives continuing recognition to the supremacy of the intent of the people over the desires of their agents. 27

Courts have to realize that the drafting of the Constitution was itself an act in the pursuit of virtue, and the entity given the power to enforce it must continue that pursuit if it wishes to preserve its claim to legitimacy.

This is not a license for the Court to act in elitist ways. Philosophy may be needed, but not philosopher kings. The Court must understand that in a system born out of the consent of the governed, wisdom lies in the voice of the people when they spoke in their most able and pure form, when the best of what they believed their reason could achieve was articulated. The Court must seek to understand the reasoning process that led to the adoption of the principles a rational people used to order their society for

27. Id. at 466-68.
their individual and common good. That process is the undercurrent to the words used in the articulation that is the Constitution. That process is, and was meant to be, an ongoing one. That is what we mean when we say that ours is a “living Constitution.”

How should a court try to understand that process?

To be sure, the courts need to read David Hume, John Locke and John Adams, and papers Federalist and Anti-Federalist. But they must also read a contemporary political theorist whose work lays out a rational process for nation building that renders artfully the Enlightenment idea that reason is the gateway to both a deeper truth and a well-ordered society. His formulation describes in modern terms the essential thought of the Framers and suggests that justice, in tangible measure, is possible by its application.

In *Political Liberalism*, John Rawls tells us that when the people exercise their power to establish a new government, they set up a “higher law,” one that has the direct authority “of the will of We the People,” a law that “binds and guides” the ordinary power their government exercises in everyday law-making. That higher law is embodied in a democratic constitution, something that is “a principled expression . . . of the political ideal of the people to govern itself in a certain way” and something that is the “aim of public reason . . . to articulate.”

But where do these principles so expressed come from? They proceed from an agreement among “free and equal citizens” who negotiate them rationally, seeking their “reciprocal advantage.” That agreement arises in the first instance in Rawls’s famous “thought experiment,” the “original position.” It is a process that resonates and echoes much of the philosophical thought that was given voice in our own Constitution.

Rawls posits a group of people coming together before their society is formed to lay down the principles they will deem most fundamental in the operation of that society once it is created. The

29. Id.
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process used to generate those principles, and the rules to enforce them, show them to be the best they have to give as reasoning people. The process has four aspects:

(1) Rules are written rationally, using the best faculties of those who adopted them;

(2) Rules are written dispassionately, before exigencies cloud judgment, but with an awareness that exigencies will arise in the course of societal governance. Rules properly drafted can be applied in times of exigencies to preserve the society without sacrificing its soul in the process. The rules are no suicide pact embraced by idealists; they are rules for realists, realists who believe that government can free them to the higher pursuits of spiritual growth in a manner of their own choosing;

(3) Rules are written with self interest in mind, as the rule-makers seek to live in the society their rules will govern; and, critically,

(4) Rules are written blindly, behind Rawls’s “veil of ignorance.” They are agreed upon by people who do not know what station in life they will occupy once the rules they all agree to live by are enacted. No matter whom the rule-maker turns out to be once the veil of ignorance is lifted, he must know that he can live with dignity in the world his rules will govern. The rules become principles no one can live without no matter who they are in society. The veil of ignorance thus changes the self-interested nature of the decision making from an exercise in selfishness to one of public-mindedness and, indeed, civic virtue.31

What comes from behind the veil, what is written into our Constitution, is a sense of a shared, common good that is then publicly affirmed in a process of consensus Rawls calls “public reason.”32 The principles so formed become part of the value of public reason in a constitutional democracy as an embracing of a core through a


32. RAWLS, supra note 28, at 231.
spirit of reciprocity that is the foundation of a democratic society. This consensus is the product of the rational forces that formed society and must be exercised in an ongoing way through time. The pursuit of virtue requires judges to seek the terms and process of that consensus, and not the mere words inked on an ancient parchment.

In Rawls’s well-ordered society, the Supreme Court must “give due and continuing effect to public reason by serving as its institutional exemplar.” Indeed, he calls the Court “the only branch of government that is visibly on its face the creature of that reason and of that reason alone,” and the Court must “protect the higher law,” by checking manipulations of law-makers that threaten the vitality of that higher law.

In doing this, the Court is not being antidemocratic. It is being anti-majoritarian with respect to ordinary law, but the higher authority of the people supports that. The Court is not anti-majoritarian with respect to higher law, as the Constitution is the first and most important product of the democratic process.

We must therefore demand that the Court act as a conscience, reminding a troubled majority of the values it established at a time when reason and a fundamentally moral process produced a consensus on values that were meant to endure. The Constitution is the first and most noble act of this Democracy, and the Court serves democracy best when it enforces that charter and the ongoing process that produced it with fidelity.

Judges, Rawls intones, serve best when they appeal “to the political values they think belong to the most reasonable understanding of the public conception and its political values of justice and public reason . . . [values] that all citizens as reasonable and rational might reasonably be expected to endorse.” That is the pursuit of virtue.

If they fail in this pursuit, the reasoned judgment of the people may eventually correct them, but the Court will have lost its legitimacy in the process. Rawls observes that “[t]he constitution is not what the Court says it is. Rather, it is what the people acting

34. RAWLS, supra note 28, at 235.
35. Id.
36. Id. at 233-34.
37. Id. at 236.
constitutionally ... allow the Court to say it is." Justice John Harlan, in his dissent in *Poe v. Ullman*, agreed.

Due process, Justice Harlan wrote, derives from a rational process of balancing personal liberty and the needs of social order. But the process is not one where judges are free to roam at their whim, going wherever unguided speculation might take them. The balance is the product of the traditions judges must appreciate, some developing in the here and now, some freshly broken in light of a new, reasoned consensus. The process is as organic as it is rational: "That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound." 

Our shared values thus work like political gravity, pulling errant legal decisions down to the plane of popular consensus. That gravity works its magical, corrective function though, only when democratic institutions are functioning as their makers intended. Federalism, separation of powers, and publicly acknowledged human rights, all enforced by courts not controlled solely by transient majoritarian forces, are necessary prerequisites for these gravitational forces to function effectively.

Judges, though, should not wait for other forces in society to correct their failure to uphold the core principles in the Constitution. Extra-judicial correction of the courts' failures can result in long periods of needless oppression and render the courts permanently ineffective to play their crucial role. Judges need always to understand that the core of justice is the pursuit of virtue, a pursuit founded upon and requiring the constant exercise of reason to appreciate the nature of the ongoing societal consensus that underlies it. By seeking virtue, the Court will find itself coming home to reason.

We grant large amounts of judicial independence so courts may make this journey. The American patriot Arthur Lee called liberty the parent of virtue, and creating institutional safeguards to free the Court to perform its crucial role is surely necessary. Indeed, Thomas Paine reminded us that reliance upon the individual integrity of public office holders was not the most efficacious way to ensure the long-term health of a republic. "When we

38. *Id.* at 237-38.
41. ROBINSON, *supra* note 17, at 8.
are planning for posterity,” he wrote in *Common Sense*, “we ought to remember that virtue is not hereditary.”

But judicial independence is something we should only tender with a clear expectation of receiving something of great value in return. Like the big stick, it is a commodity to be purchased in the currency of a faithful commitment to an ongoing and singularly focused pursuit of virtue. We must demand that this pursuit be a vigorous one. We must look to the courts and say, in Milton’s words:

I cannot praise a fugitive and cloistered virtue, unexercised and unbreathed, that never sallies out and sees her adversary but slinks out of the race, where that immortal garland is to be run for, not without dust and heat.

Dr. Brewer has run that race. He bears the dust and most surely feels the heat. Can any of us who cares about the virtue we hope underlies our system pursue it with anything short of that intense breed of constitutional passion? Can any of us shrink from anger at the failure of courts anywhere to pursue it?

That passion and that anger will not go unrewarded. If, by their expression, courts turn to the singular pursuit of virtue as their institutional mandate, then, someday, we will all be able to go home again.

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