

The Role of the Article III Judge

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The Constitution says precious little about the role envisioned for federal judges in the new government that document created: “The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.”¹

The framers’ brevity in writing that description may be one reason that there has been a vigorous debate over the scope and content of this “judicial power” since the founding of the Republic. (Indeed, that debate was a major feature of the 2020 presidential election campaign and led to President Biden’s creation of the Commission on the Supreme Court, on which I served.)

Determining a judge’s role under the Constitution is central to the successful working of the separated powers which are the hallmark of the government the framers created. Some argue that they are a more important guarantor of our liberties than even the Bill of Rights and the Civil War Amendments.² And yet we live in a time when the roles

1. U.S. Const. art. III, § 1.

2. “Justice Scalia expounded on what sets the United States apart from other countries: not the Bill of Rights, which ‘every banana republic has,’ but the separation of powers.” Emmarie Huetteman, “Breyer and Scalia Testify at Senate Judiciary Hearing,” *New York Times*, October 6, 2011, <https://www.nytimes.com/2011/10/06/us/politics/breyer-and-scalia-testify-at-senate-hearing.html>.

assigned to our public officials under the Constitution seem of less interest to people than whether those officials' decisions align with the citizenry's favored outcomes. We seem not to care as much about who decides what we want achieved—be it the president, the Congress, or the judiciary—as we care that it simply gets done!

In his 2020 book, *A Time to Build*, Yuval Levin bemoans the corrosive effect on civil society from this lack of interest in the roles we are called to play. As Levin sees it, we have lost sight of a question that is central to the success of the institutions that give life to civil society: "Given my role here, how should I act?"³ Too many officeholders seem less interested in the role they are to play within the institution in which they serve than they are in using that institution as a platform on which to perform.⁴

From 2005 to 2020, I was one of the "Judges" on the U.S. Court of Appeals for the D.C. Circuit, one of the "inferior Courts" that the Constitution authorized Congress to create. In this essay, I will use my experience to attempt to explain my understanding of the nature of the "judicial power" my colleagues and I were commissioned to use.

I

Although it was far from a pleasant experience, the Senate's confirmation of my nomination as a circuit judge by President George W. Bush was smooth sailing compared to the tempestuous proceedings others have endured. For that I am grateful. In fact, I was surprised that I was not asked some hard questions, which in hindsight seem indispensable to the Senate's properly performing its constitutional duty to give the president "advice and consent" on his judicial nominations.⁵ For example, I should have been asked my views on how a judge ought to interpret the Constitution ("Are you an originalist, a legal realist, a believer in the 'living Constitution'?"?), read statutes ("Do you favor Eskridge's 'dynamic' interpretation, or are you a textualist?"?), and apply regulations ("Is *Chevron* deference an abdication of the judicial role or a properly deferential response to a delegation of legislative power from the Congress to the executive branch?""). I don't recall a single question along any of those lines. Except one.

3. Yuval Levin, *A Time to Build: From Family and Community to Congress and the Campus, How Recommitting to Our Institutions Can Revive the American Dream* (New York: Basic Books, 2020), 168.

4. Levin, *Time to Build*, 33–34.

5. U.S. Const. art. II, §2, cl. 2.

That question came early in the process, even before the president had nominated me. I was invited to the White House to interview with Alberto Gonzales, counsel to President Bush, and several of his colleagues in the West Wing. The interview went well, and I was told afterwards that it would be helpful to my chances of being nominated by the president if I could show that I would have the support of the Republican and Democratic Senate leaders I had worked for as Senate legal counsel, the nonpartisan chief legal officer of the United States Senate.

I went immediately to see Senator Orrin Hatch, then the chairman of the Senate Judiciary Committee, who, I was happy to learn, was willing to be an enthusiastic supporter. Next was a visit with Senator Harry Reid, then the whip of the Democratic conference, who was similarly encouraging. Senator Reid insisted that I meet with Democratic leader Senator Tom Daschle. I had come to know Senator Daschle well during my service as Senate legal counsel, and we both respected and liked one another. As is often the case when meeting with a busy senator, especially when not part of his planned schedule, I had to wait for a while in his office before seeing him.

Upon learning that I was waiting to see Senator Daschle, his chief of staff kindly invited me into his own office for a pleasant reunion in which we recalled projects we had worked on together. Senator Daschle briefly joined us, greeting me with a warm hug as he voiced his pleasure that I was under consideration by the president for an appointment to the D.C. Circuit. It was all very heady stuff. But there was another person in the room whom I did not know personally. He had not been on Senator Daschle's staff while I served the Senate. I did know, however, that he was the architect of the Democrats' strategy to filibuster some of President Bush's judicial nominees, including the nominee whose withdrawal from consideration created an opening for me.

When Senator Daschle left the room, this staffer started asking me questions to probe who I was and what I was about. It was during that conversation that the tough question came.

Predictably, he asked me which judge had most shaped my thinking about the law.

“John Marshall,” I said. A safe answer, I assumed.

Then he added, “*Other* than John Marshall.”

I paused for a moment. The answer was Robert Bork, but I hesitated to confess this to the architect of the Democrats' filibuster strategy. Bork was anathema to progressives. Many senators carried scars from his confirmation battle. With more than a little anxiety, I answered

truthfully. “Bork. Robert Bork. I agree with his views about the role of a judge. The judge is bound to follow the law as ratified in the Constitution, enacted by Congress, or promulgated by the executive with authority delegated by Congress. And the judge is to apply the law neutrally, not favoring an outcome just because it aligns with his favored political position or his own sensibilities about what is fair and just.”

Apparently sensing my anxiety, the staffer assured me that my answer was acceptable. “Don’t worry, Tom. We understand that President Bush gets to appoint conservatives to the bench.”

Emboldened by that response, I declared myself an acolyte of Bork throughout the confirmation process. It must have worked. I was confirmed by the Senate and appointed by the president.

II

A few months later, I found myself, as a judge on the D.C. Circuit, being asked to render decisions in cases raising a host of issues I had never thought about deeply before. Some involved determinations that would affect only the litigants, such as whether the Federal Aviation Administration had wrongly stripped a license from a commercial pilot.⁶ Others had a broader and more consequential reach, such as whether a dying child had a Constitutional right to use promising experimental drugs that had not yet run the gauntlet of the approval process required by the Food and Drug Administration,⁷ the power of the police to use GPS to track the movements of a suspect without a warrant,⁸ whether the Second Amendment recognized an individual right to use a firearm for self-defense at home⁹ and elsewhere,¹⁰ and the legality of the detentions in Guantanamo Bay.¹¹ As I worked through these and other cases, I began to wonder whether I should have read more than Bork to help me understand my role.

A federal judge can supplement his salary only by writing books and teaching classes at law schools. I love the classroom and so opted for that

6. *Casino Airlines, Inc. v. NTSB*, 439 F.3d 715 (D.C. Cir. 2006).

7. *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695 (D.C. Cir. 2007).

8. *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010).

9. *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007).

10. *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017).

11. For example, see *Kiyemba v. Obama*, 561 F.3d 509, 522–27 (D.C. Cir. 2009) (Griffith, J., concurring in part); *Abdah v. Obama*, 630 F.3d 1047 (D.C. Cir. 2011) (Griffith, J., dissenting from denial of rehearing en banc).

course. Dean Kevin J. Worthen was kind enough to offer me the chance to teach at Brigham Young University's law school. He also generously allowed me to choose the courses I would teach. I decided to take this opportunity and read more than Bork. I have now taught a course on the role of the Article III judge every academic year since 2008, first at BYU, then at Stanford, and now at Harvard. At the beginning of the course, I tell my students that I started my service as a judge committed to Bork's views, but that I wanted to use this course to test whether that was a commitment I should keep. After grounding ourselves in Bork's writings, we bring on his sympathizers and challengers and study the history. We read the views of Antonin Scalia, Benjamin Cardozo, Stephen Breyer, Cass Sunstein, Ronald Dworkin, and other thoughtful judges and scholars.

It has been an exhilarating experience, but in the first few years, it was a troubling one. Prior to teaching the course, I had been persuaded by Bork's insistence that a judge is bound by the terms of the Constitution as they were understood by those who ratified them. A judge is not free to "update" the Constitution to make its provisions align with more modern sensibilities. We leave that to We, the People, through the amendment process. This view is called "originalism"—the idea that law has a meaning that is best captured by what the public understood it to mean at the time it was enacted. In this view, the role of a judge is limited to applying that meaning. Bork offered this view in contrast to those who saw the judge as the custodian of a "living Constitution," whose protections for political minorities expand over time through judicial decisions following the "arc of history."

To my surprise and concern, the history of the early years of the Republic seemed to suggest that the framers may have had something like that latter view of a judge in mind. After all, "the judicial Power" with which they were acquainted was formulated in England over centuries and involved judges trying to determine the just result, the fair disposition, the equitable outcome.

This information created something of a faith crisis for me. What if the framers' understanding of the role of a judge was far different from Bork's? Bork was no historian, after all. Indeed, his work has been targeted by withering criticism on that very ground.¹²

12. For example, see the book review of Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Touchstone, 1990), in Bruce Ackerman, "Robert Bork's Grand Inquisition," *Yale Law Journal* 99, no. 6 (1990): 1419–39.

My faith was restored, however, when I discovered the insight of John F. Manning, now dean of Harvard Law School. In a clash of the Titans, Manning and William Eskridge of Yale Law School, wrote dueling (and lengthy) articles in the *Columbia Law Review* on the public understanding of the role of a judge in the earliest years of the Republic.¹³ Their debate is required reading in my class.

Here is my take on that debate. Eskridge seems to have the better of the argument that the predominant view of the earliest judges in the Republic is that “the judicial Power” was of the same sort that common law judges in England had exercised. That power included the authority to go beyond the express terms of the law and update legislative acts to achieve what the judge believed was the purpose of the legislation. This is a view similar to those who argue for a “living constitution.” But Manning wins the day, I think, by pointing out that regardless of the type of judge the framers had in mind, the structure of government they created left no room for a judge who would make law. Instead, the Constitution created a government in which the determinations as to what is just, fair, and equitable are made by We, the People, through their elected representatives in enacted law.

The unelected, life-tenured judiciary created by Article III plays no role in making law under the Constitution’s scheme. The role of the judge is to apply law made by elected representatives. In short, even if the framers thought “the judicial power” under the Constitution would allow for the common law judges with which they were familiar, the structure of government they created left no oxygen for such judges. Instead, the framers created a new type of judge.

I am reminded of the cartoon from my high school civics class titled “How a Bill Becomes a Law.” (My children and grandchildren know its more recent formulation, the song “I’m Just a Bill” in the movie *Schoolhouse Rock*.) There were no judges in the cartoon or song—a silent witness to a fundamental point that undergirds the Constitution. The most pressing issue for the framers of the Constitution in 1787 was not which rights of individuals were free from government interference. That was an important question, to be sure, and was addressed largely by implication in the original Constitution and later by amendment. The most

13. John F. Manning, “Textualism and the Equity of the Statute,” *Columbia Law Review* 101, no. 1 (January 2001): 1–127; William N. Eskridge Jr., “All About Words: Early Understandings of the ‘Judicial Power’ in Statutory Interpretations, 1776–1806,” *Columbia Law Review* 101, no. 5 (June 2001): 990–1106.

pressing issue for the framers in the summer of 1787 was “Who decides the rules that govern the nation?” and they were careful to create separate spheres of decision making for the three branches of the federal government.

In fact, judges who take it upon themselves to determine what the law should be by their own refined sensibilities rather than acting as faithful agents of the elected representatives do great damage to the form of government the Constitution created. The laws of the government the framers established would not be determined by a monarch or a prelate or a body of wise people. They would be created according to a complicated process that involved bicameral passage by different legislative bodies representing different regional interests and presentment to a nationally elected president. Under the Constitution, lawmaking is meant to be difficult, and it is a role reserved to Congress and the president, not judges.

The robed and unelected Article III judge who serves for life is an odd duck in the Constitutional scheme. We are reminded of that during every State of the Union address. The justices of the Supreme Court look out of place amid the partisan ballyhoo. That is as it should be. Judicial independence is a vital feature of the rule of law and is best achieved when federal judges act, as Justice Felix Frankfurter said they must, as “merely the translator of another’s command.”¹⁴ The command comes from the law established by the political branches. The judge’s role is to translate that command to the case at hand, not to advance his own sense of what is just, fair, and equitable.

Which means that as a judge I would rule to strike down gun regulations I might favor as a private citizen because they run afoul of the Second Amendment’s guarantee of the personal right to armed self-defense.¹⁵ Or that my citizen’s sympathies for children dying of leukemia couldn’t help me find a constitutional right for them to bypass the gauntlet for access to promising experimental drugs created by Congress.¹⁶ Or that my interest as a citizen in finding out whether President Trump told his White House counsel to obstruct justice should not lead me to grant to the federal courts a power which they do not have to resolve a dispute between Congress and the president.¹⁷ Without the guardrails on judges

14. Felix Frankfurter, “Some Reflections on the Reading of Statutes,” *Columbia Law Review* 47, no. 4 (May 1947): 534.

15. *Parker*, 478 F.3d 370; and *Wrenn*, 864 F.3d 650.

16. See *Abigail Alliance*, 495 F.3d 695.

17. 951 F.3d 510 (D.C. Cir. 2020).

created by the Constitution's separation of powers, my decision in each of these cases (and others) would have been different.

III

There are four discrete procedural steps to the making of an Article III judge. The president nominates, the Senate confirms, and the president appoints. But the Constitution also requires that no judge can take office until he has first sworn an oath. Oaths are mentioned three times in the Constitution. The words of the president's oath are set forth in the Constitution.¹⁸ Senators must take an oath before participating in an impeachment proceeding.¹⁹ And all state and federal officeholders, including judges, must take an oath to support the Constitution.²⁰ In fact, the first act of the first Congress created the words of that oath, which have been amended only rarely since then.

Today the Article III judge swears, with God as his or her witness and help, to "administer justice without respect to persons, and do equal right to the poor and to the rich, . . . faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and the laws of the United States,"²¹ and "that I support and defend the Constitution . . . against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same."²²

In 2018, there was an extraordinary moment that played out in the national media. President Donald J. Trump had criticized a decision made by what he called "an Obama judge." Immediately, Chief Justice John G. Roberts Jr. rebuked the president, explaining, "We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them."²³ To President Trump, judges were mere partisans whose loyalty, he assumed, should run to him. The chief justice would not allow such a demeaning view of the judiciary from the president of the United States to go unchallenged.

18. U.S. Const. art. II, § 1, cl. 8.

19. U.S. Const. art. I, § 3, cl. 6.

20. U.S. Const. art. VI, cl. 3.

21. 28 U.S.C. § 453.

22. 5 U.S.C. § 3331.

23. Adam Liptak, "Chief Justice Defends Judicial Independence after Trump Attacks 'Obama Judge,'" *New York Times*, November 21, 2018, <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html>.

I am with the chief justice. In my fifteen years on the D.C. Circuit, I never once saw a judge cast a vote that I thought was tainted with partisan concerns. To be sure, we disagreed over how to interpret precedent, the Constitution, statutes, regulations, treaties, and contracts. Those disagreements are vital to a collegial enterprise. But never did I see a colleague whose agenda was to advance the political aims of the president who appointed him or her or the party to which he or she once belonged. Each of my colleagues took seriously the oath to be impartial.²⁴

Is it fanciful to think that something as fragile as an oath can work to protect the structure of government created by the Constitution? Just such a skeptic sent me an email to that effect in the wake of a controversial opinion I wrote with which he heartily disagreed. The opinion had sided with the views of the Trump Justice Department in a politically fraught matter: “You old pathetic fool,” the email began. “Do you honestly believe the Founding Fathers intended Presidents to be constrained by oaths? I hope whatever [President Trump] has given you was worth the time you’ll spend in hell.”

Upon the advice of the U.S. Marshals, I did not reply to the email, but if I had, I would have said, “Yes, I really do believe the framers intended that officeholders, including judges, would be constrained by oaths.” And then I would have been sorely tempted to add, with a touch of self-righteousness, no doubt, that my personal views of the matter did not come into play in my decision.

I would then have quoted a famous passage from *A Man for All Seasons*, a dramatic portrayal of the martyrdom of St. Thomas More, the patron saint of lawyers and politicians, executed by Henry VIII because he took seriously the value of an oath. In this scene, the members of More’s family have urged him to arrest Richard Rich, who they suspect of ill intent:

Margaret [More’s daughter]: Father, that man’s bad.

More: There’s no law against that.

Roper [Margaret’s husband]: There is! God’s law.

More: Then God can arrest him.

...

Alice [More’s wife]: While you talk, he’s gone.

24. Justice Stephen Breyer has said the same about his service on the Supreme Court: “Justice Breyer said he had not seen a decision influenced by politics in his 17 years on the court.” Huetteman, “Breyer and Scalia Testify at Senate Judiciary Hearing.”

More: And go he should if he were the Devil himself until he broke the law.

Roper: Now you'd give the Devil benefit of law!

More: Yes. What would you do? Cut a road through the law to get after the Devil?

Roper: I'd cut down every law in England to do that.

More: Oh? And when the last law was down—and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—Man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then? (*Quietly*) Yes, I'd give the Devil benefit of law, for my own safety's sake.²⁵

I believe that the judicial oath requires a judge sometimes to give “the Devil benefit of law.”

Recently, I revised the way I begin our class. Now I start with the oath. We read about the history of the judicial oath, and then we parse its words. Next, we watch the scene from episode 5 of season 1 of *The Crown*, where the young Elizabeth hears from her father about the transformative power of the oath.²⁶ Then we watch *A Man for All Seasons*.

But the highlight of this section of the course comes with a visitor. Judge Jeffrey Sutton of the U.S. Court of Appeals for the Sixth Circuit, which sits in Cincinnati, Ohio, teaches a course on state constitutions during the same term that I teach, and I ask him to come speak to my class. But it is not state constitutions that I care about, so when Judge Sutton finishes his lecture and leaves, I explain the reason for his visit. He is, in my mind, the model Article III judge because he kept his oath of office, and it cost him.

For years, thoughtful commentators had suggested that Judge Sutton would be an ideal appointment to the Supreme Court. He has the perfect resume, having clerked on the Supreme Court and been the solicitor general for Ohio before becoming a distinguished judge on an important court. He is an extraordinary scholar and classroom teacher with a winning personality. But Judge Sutton wrote the opinion that the Supreme Court overturned in *Obergefell*.²⁷ Not that he is personally opposed to

25. Robert Bolt, *A Man for All Seasons: A Drama in Two Acts* (1960; New York: Samuel French, 1990), 56.

26. *The Crown*, season 1, episode 5, “Smoke and Mirrors,” directed by Stephen Daldry, written by Peter Morgan, released November 4, 2016, Netflix, <https://www.netflix.com/title/80025678>.

27. DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), reversed in *Obergefell v. Hodges*, 576 U.S. 644 (2015).

same-sex marriage (I have no idea as to his views on the matter), but he did not think the Supreme Court's precedents would allow a circuit court to find that right in the Constitution. Judge Sutton also wrote an opinion upholding the constitutionality of the Affordable Care Act.²⁸ Not that he favored Obamacare as a policy (again, I have no idea about his views on healthcare), but he did not think the Supreme Court's precedents would allow a circuit court to strike down this act of Congress. For those partisans who fail to see that the role of an Article III judge is to apply law as it exists and not to advance the political aims of partisans with whom they might agree as a citizen, Judge Sutton's principled decisions disqualified him from an appointment to the Supreme Court. Their misunderstanding of the role of a judge not only leaves the nation poorer but does great damage to the structure of government the framers created. And they do not understand the power of an oath.

Perhaps my email critic was right. Maybe human nature is such that we cannot rely on an oath to keep judges within the narrow lane the Constitution creates for them. But I am betting otherwise. To the framers, taking the oath was more than ceremony and ritual. It would transform the oath taker into a judge whose primary loyalty when performing the duties of his or her office was to the Constitution and the laws enacted by Congress and not to any other commitment, be it his or her faith, family, political views, the party that supported him or her, or the president who appointed him or her.

Remember the joke about the quarrel between two disputants over the proper form of Christian baptism? When one asked the other whether she believed in baptism by immersion, she replied, "Yes. I've even seen it done!" I believe in the power of the judicial oath to limit the role of the Article III judge under the Constitution because I've seen it done. By Judge Sutton. By my colleagues on the D.C. Circuit. By judges throughout the nation.

IV

One of Abraham Lincoln's favorite quotes was from Alexander Pope's *Essay on Man*: "Act well your part, there all the honor lies."²⁹ The wisdom of that exhortation can be applied across many activities of life. It is at the heart of Yuval Levin's plea for "hope and renewal" in a badly fractured

28. Thomas More Law Center v. Obama, 651 F.3d 529, 549–566 (6th Cir. 2011) (Sutton, J., concurring in part).

29. William Lee Miller, *President Lincoln: The Duty of a Statesman* (New York: Vintage Books, 2008), 38–39.

America whose institutions are in desperate need of repair.³⁰ And it is central to understanding the framers' vision for the republic they created, but which they knew would be a daunting challenge to keep.³¹

The most fundamental freedom the framers created was the liberty to make the laws by which society is governed. The people make those laws through their elected representatives.³² The role of judge in this system is important, but limited. It is to follow the law, not to make it, and to resist the temptation to replace the judgments of those elected by We, the People with his or her own sensibilities.

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30. Levin, *Time to Build*, 199.

31. Dennis Rasmussen, *Fears of a Setting Sun: The Disillusionment of America's Founders* (Princeton: Princeton University Press, 2021).

32. See Akhil Reed Amar, *America's Constitution: A Biography* (New York: Random House, 2005), 10.