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The Perspective of a Junior Circuit Judge on Judicial Modesty

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DUNWODY DISTINGUISHED LECTURE IN LAW

THE PERSPECTIVE OF A JUNIOR CIRCUIT JUDGE ON JUDICIAL MODESTY

*The Honorable William H. Pryor Jr.**

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I appreciate the invitation to deliver the Dunwody Lecture this year, and I am grateful that this occasion has allowed me to visit, for the first time, one of the premier law schools in this Circuit and our nation. The Levin College of Law enjoys an excellent reputation for the education of lawyers. It is the alma mater of three judges of our court, and each year top graduates of this college serve our court with distinction as law clerks. I hope this visit will be the first of many to come for me.

My topic today is judicial modesty, which some critics of the federal judiciary might say is an oxymoron. After all, these critics, in

* Circuit Judge, United States Court of Appeals for the Eleventh Circuit. I thank Ed Whelan and my law clerks for helpful comments about an earlier draft of this Lecture.

recent years, have dubbed it “the imperial judiciary,”¹ “the most dangerous branch,”² and “our judicial oligarchy.”³ Modesty is not a typical charge against the federal courts.

This problem is not new. As far back as the early nineteenth century, the federal judiciary has had its critics. As historian Forrest McDonald has explained, “To most Jeffersonians, the federal judiciary stood as a barrier to the realization of the kind of society they envisioned for America”⁴ Thomas Jefferson described the judiciary as “[t]he great object of my fear,”⁵ and he may have been the first to call it “the most dangerous”⁶ branch. He mocked the federal judiciary as “our foreign department.”⁷

Even in the eyes of the contemporary legal profession, the federal judiciary still often suffers from a reputation for pomposity and even arrogance. Consider the popularity of a parody sung by a group of lawyers from Austin, Texas, who moonlight as musicians and call themselves “The Bar and Grill Singers.”⁸ They entertain audiences at bar conferences with a tune entitled “Appointed Forever,”⁹ which is a remake of the song “Happy Together”¹⁰ by The Turtles. It begins,

Imagine me as God. I do.
I think about it day and night.
It feels so right.
To be a federal district judge and know that I’m
Appointed forever.¹¹

The chorus is even funnier and more biting:

1. See, e.g., MATTHEW J. FRANCK, *AGAINST THE IMPERIAL JUDICIARY: THE SUPREME COURT VS. THE SOVEREIGNTY OF THE PEOPLE* (1996); Edwin Meese III, *The Imperial Judiciary—And What Congress Should Do About It*, POL’Y REV., Jan.–Feb. 1997, available at <http://www.hoover.org/publications/policyreview/3574172.html>; Charles Krauthammer, *Our Imperial Judiciary*, TIME, Dec. 4, 2000, at 46, available at <http://www.time.com/time/printout/0,8816,998639,00.html>.

2. See, e.g., Simon Lazarus, *The Most Dangerous Branch?*, ATLANTIC, June 2002, at 24, available at <http://www.theatlantic.com/doc/print/200206/lazarus>.

3. Robert H. Bork, *Our Judicial Oligarchy*, in *THE END OF DEMOCRACY?: THE JUDICIAL USURPATION OF POLITICS* 10 (Mitchell S. Muncy ed., 1997).

4. FORREST McDONALD, *THE PRESIDENCY OF THOMAS JEFFERSON* 81 (1976).

5. Letter from Thomas Jefferson to Spencer Roane (Mar. 9, 1821), in 15 *THE WRITINGS OF THOMAS JEFFERSON* 325, 326 (Albert Ellery Bergh & Andrew A. Lipscomb eds., 1st mem’l ed. 1903).

6. Letter from Thomas Jefferson to Admantios Coray (Oct. 31, 1823), in 15 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 5, at 480, 486–87.

7. Letter from Thomas Jefferson to Edward Livingston (Mar. 25, 1825), in 16 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 5, at 112, 113.

8. See *The Bar & Grill Singers*, <http://www.barandgrillsingers.com> (last visited Sept. 1, 2008).

9. *THE BAR AND GRILL SINGERS*, *Appointed Forever*, on *LICENSED TO GRILL* (1997).

10. *THE TURTLES*, *Happy Together*, on *HAPPY TOGETHER* (White Whale Records 1967).

11. *THE BAR AND GRILL SINGERS*, *supra* note 9.

I'm a federal judge and I'm smarter than you.
 For all my life.
 I can do whatever I want to do.
 For all my life.¹²

Contrast the reputation of the federal judiciary reflected in this musical parody with the sober requests of leading federal judges, in recent years, for an age of judicial modesty. This desire has been expressed by both Chief Justice John Roberts, Jr. and Circuit Judge Richard Posner. Their call has been widely praised.¹³

I too welcome the call for an age of judicial modesty, and when you consider the contrast between the judiciary and the political branches, there is plenty about our unique branch that lends itself to the virtue of modesty. While judges shun cameras and microphones and protest legislative attempts to allow those implements of the news media into courtrooms, political officers rarely miss an opportunity to appear on broadcasts of the mass media. While politicians use the time-honored tool of a press conference, judges communicate through written opinions often published almost anonymously as “per curiam.” While politicians are watched closely for their appearances and fashions, judges are rarely seen by the public and then only at an elevated distance dressed in plain black robes.

Early on, Chief Justice John Marshall shunned political controversy when he wore a black robe as a statement of the need for judicial modesty. A biographer of Marshall, Jean Edward Smith, explained that Marshall led by example when he took the oath of office in February 1801:

Breaking with tradition, he wore a plain black robe in the republican fashion of the judges of the Virginia court of appeals. The other justices, Cushing, Chase, and Washington, were attired either in the traditional scarlet and ermine of the King’s Bench or their individual academic gowns—the “party-colored robes” of an oppressive judiciary, in the words of Senator Stevens Thomson Mason. By wearing black, Marshall was making a quiet statement. He had seen the Federalists self-destruct electorally through an excess of hubris, and he recognized

12. *Id.*

13. See, e.g., Stuart Taylor Jr., *In Praise of Judicial Modesty*, NAT’L J., Mar. 18, 2006, at 13, available at http://www.nationaljournal.com/njmagazine/nj_20060318_3.php?related=true&story1=null&story2=null&story3=null (discussing the arguments and three specific examples given by Circuit Judge Richard Posner illustrating both judicial modesty and immodesty); Editorial, *Confirm Samuel Alito*, WASH. POST, Jan. 15, 2006, at B6 (“The institutional self-discipline and modesty that both Judge Alito and Chief Justice Roberts profess could do the court good if taken seriously and applied apolitically.”).

that the Court was on shaky ground. Why flaunt the colors of the English judiciary when the black robes worn by Pendleton and Wythe would do just as well? The decision had symbolic importance, but the chief justice had another motive. Marshall was a small-r republican and he was uncomfortable with trappings of power.¹⁴

I draw the contrast of the judiciary with the political branches not as a critic of politicians but as a former politician who respects their vital work. The officers of the political branches are not stewards of modest power; they develop national policies and must remain accessible and accountable to the people. When the judicial role of applying the law fairly and impartially is contrasted with the power and energy of the elected branches, the judiciary should be considered the modest branch.

To be sure, there are routine practices of our peculiar branch that suggest the judiciary routinely succumbs to the temptation to be immodest. After all, there is a courtroom decorum that requires everyone to stand when judges enter the room, lawyers to call judges “Your Honor,” and invocations for God to save the judiciary as a bulwark of our free nation. These ceremonial rituals are intended as signs of respect for the judiciary itself, but perhaps they add to a reputation for haughtiness.

In the interest of contributing to the improvement of our reputation, even though that reputation, on balance, is still deservedly good, I will attempt to explain some qualities of judicial modesty and suggest ways of promoting this virtue. Unlike the recent expressions of Chief Justice Roberts and Judge Posner, my perspective does not concern how the Supreme Court should interpret the Constitution. I will leave that important issue to other commentators who already provide it plenty of attention. I will instead apply what both the Chief Justice and Judge Posner have said about the rudiments of judicial modesty to aspects of the federal judiciary that are more parochial. As the most junior member of the Court of Appeals for the Eleventh Circuit, my vantage is not as lofty as others, so my contribution will be, shall I say, more modest.

After I provide an overview of judicial modesty based on what the Chief Justice and Judge Posner have said about it, I will address two aspects of my work that provide opportunities to display judicial modesty. First, I will address an aspect of the adjudicative work of the courts of appeals: that is, our orders denying rehearing en banc and the routine practice of filing dissenting opinions to accompany those orders. I will argue that these opinions are inconsistent with judicial modesty. Second, I will address a component of the administrative work of the federal judiciary: that is, our policy about employing either term or career law

14. JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 285–86 (1996) (asterisk and footnote omitted).

clerks. I will argue that the policy recently adopted by the Judicial Conference of the United States that limits federal judges to one career clerk is consistent with judicial modesty.

I. AN OVERVIEW OF THE RUDIMENTS OF JUDICIAL MODESTY

Judge Posner embedded the phrase “judicial modesty” in our lexicon when he published in the *Harvard Law Review* a critical review of the 2004 term of the Supreme Court.¹⁵ Posner entitled his essay “A Political Court.”¹⁶ Judge Posner criticized the decision in *Roper v. Simmons*¹⁷ for having “brushed aside *Stanford v. Kentucky*, which sixteen years earlier had held that executing a sixteen- or seventeen-year-old does not violate the prohibition against cruel and unusual punishments.”¹⁸ He faulted the Court for having ignored the “rich statistical literature on the deterrent effect of capital punishment.”¹⁹ He wrote that the decision in *United States v. Booker*²⁰ was “regrettable”²¹ because, in his view, “invalidating the mandatory character of the Sentencing Guidelines”²² would not “yield a net social benefit”²³ and the mandatory guidelines “could not be thought inconsistent with all reasonable understandings of the Sixth Amendment.”²⁴ He described as “injuriously unpragmatic,”²⁵ the decision in *Clinton v. Jones*,²⁶ “in which the Supreme Court refused to grant President Clinton immunity from Paula Jones’s suit for sexual harassment until his term of office ended.”²⁷ Posner thought it was “obvious . . . that forcing the President to submit to a deposition in a case about his sexual escapades would be political dynamite that would explode and interfere with his ability to perform his duties.”²⁸

Judge Posner also praised some of the decisions of the Supreme Court. He described *Zelman v. Simmons-Harris*,²⁹ in which “the Supreme Court upheld the constitutionality of a voucher system whereby public monies are funneled to private schools, most of which are Catholic parochial

15. Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31 (2005).

16. *Id.*

17. 543 U.S. 551 (2005).

18. Posner, *supra* note 15, at 42 (citing *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989)).

19. *Id.* at 64.

20. 543 U.S. 220 (2005).

21. Posner, *supra* note 15, at 60.

22. *Id.* at 59.

23. *Id.*

24. *Id.* at 60.

25. *Id.* at 92.

26. 520 U.S. 681 (1997).

27. Posner, *supra* note 15, at 92.

28. *Id.*

29. 536 U.S. 639 (2002).

schools,”³⁰ as “a good pragmatic decision because it allowed a social experiment.”³¹ He lauded the “pragmatic soundness”³² of *Kelo v. City of New London*³³ because “it tосse[d] the issue [of eminent domain] back into the democratic arena.”³⁴ Posner hailed the decisions allowing a display of the Ten Commandments in *Van Orden v. Perry*³⁵ and disallowing another in *McCreary County v. ACLU*³⁶ as a “sensible approach to dealing with indeterminate legal questions charged with political passion.”³⁷

Judge Posner explained the elements of judicial modesty by contrasting “aggressive” and “modest” approaches to judging.³⁸ The aggressive judge “expands the Court’s authority relative to that of other branches of government.”³⁹ The modest judge “tells the Court to think very hard indeed before undertaking to check actions by other branches of government.”⁴⁰

Posner also explained two “[f]ormulations of the modest approach.”⁴¹ The first is “James Bradley Thayer’s principle that statutes should be invalidated only if they are contrary to any reasonable understanding of the constitutional text.”⁴² The second is Justice Holmes’s “‘can’t help,’ or ‘puke,’ test: a statute is unconstitutional only if it makes you want to throw up.”⁴³ Posner posited that “Thayer’s approach limits, it never expands, judicial review”⁴⁴ and “Holmes’s approach allows stretching the constitutional text when necessary to avoid extreme injustice.”⁴⁵

Posner concluded that the modest judge is a “timid politician,”⁴⁶ and Posner lamented, “Judicial modesty is not the order of the day in the Supreme Court.”⁴⁷ In several cases, “the Court should have stayed its hand and allowed the challenged government officials to have their way.”⁴⁸

30. Posner, *supra* note 15, at 90 (footnote omitted).

31. *Id.* at 92.

32. *Id.* at 98.

33. 545 U.S. 469 (2005).

34. Posner, *supra* note 15, at 98.

35. 545 U.S. 677 (2005).

36. 545 U.S. 844 (2005).

37. Posner, *supra* note 15, at 102.

38. *See id.* at 54–60.

39. *Id.* at 54.

40. *Id.*

41. *Id.*

42. *Id.* (citing James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 138–52 (1893)).

43. *Id.* at 55 (citing Letter from Justice Holmes to Harold Laski (Jan. 11, 1929), in 2 HOLMES-LASKI LETTERS 1124 (Mark Dewolfe Howe ed., 1953)).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 56.

48. *Id.* at 102.

Posner called on the Court to “be restrained in the exercise of its power, recognizing the subjective character, the insecure foundations, of its constitutional jurisprudence.”⁴⁹

Although Judge Posner’s explication of judicial modesty was confined to the role of the Supreme Court in constitutional interpretation, he wrote based “on the impressions that [he had] gleaned from being a federal appellate judge for . . . twenty-four years.”⁵⁰ The role of judicial review is shared, after all, at all levels of the federal judiciary, and several aspects of the federal judicial experience no doubt informed his perspective.

I recognize that Judge Posner “associate[s] judicial pragmatism with judicial modesty[.]”⁵¹ and I do not endorse Posner’s conception of “the pragmatic approach, which, . . . asks judges to focus on the practical consequences of their decisions.”⁵² I consider myself to be a formalist or what Judge Posner calls a “legalist.”⁵³ Judge Posner sees a “convergence between the pragmatic approach to constitutional adjudication and judicial modesty,”⁵⁴ but that convergence is irrelevant to the matters I will address.

Judge Posner’s published plea for judicial modesty was complemented nicely that same year by the confirmation hearing on the nomination of John Roberts to be Chief Justice. During the hearing, Roberts stated, “Like most people, I resist the labels. I have told people when pressed that I prefer to be known as a modest judge.”⁵⁵ From his opening statement through his answers to questions from senators of both political parties, Roberts repeatedly referred to the need for judicial modesty.⁵⁶ He described the approach as not limited to the work of the Supreme Court but as “good for the legal system as a whole.”⁵⁷

Unlike Posner, Roberts used the language of a formalist, not a pragmatist, in his opening statement, when he famously compared judges to umpires at baseball games.⁵⁸ He said,

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

49. *Id.*

50. *Id.* at 34.

51. *Id.* at 102.

52. *Id.* at 90. See generally RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003).

53. RICHARD A. POSNER, HOW JUDGES THINK 7 (2008).

54. Posner, *supra* note 15, at 91.

55. *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.* 158 (2005) (statement of Judge John G. Roberts, Jr.).

56. *Id.* at 55, 158, 180, 251, 409.

57. *Id.* at 158.

58. *Id.* at 55.

critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.⁵⁹

Roberts then elaborated on that role.

Roberts explained that his perspective of modesty was shaped by his experiences with the collegiality of a circuit court of appeals, where a judge values the views of others.⁶⁰ He said, “Part of that modesty has to do with being open to the considered views of your colleagues on the bench.”⁶¹ He praised “how valuable it is to function in a collegial way with your colleagues on the bench, other judges being open to your views, you being open to theirs.”⁶²

Roberts also professed respect for precedent, which he described as “shaped by other judges equally striving to live up to the judicial oath.”⁶³ He appeared to understand the roles of precedent and collegiality as related notions of “the modesty to be open in the decisional process to the considered views of . . . colleagues.”⁶⁴ He stated that “a modest approach requires beginning with the body of precedent . . . and that’s a recognition . . . we’re not smarter than our fathers who laid down this precedent.”⁶⁵ Roberts said, “Adherence to precedent promotes evenhandedness, promotes fairness, promotes stability and predictability . . . [which are] very important values in a legal system.”⁶⁶

Roberts, like Posner, described judicial modesty as requiring respect for the decisions of the political branches, but Roberts again addressed judicial modesty in the vernacular of a formalist, not a pragmatist.⁶⁷ He stated that modesty “means an appreciation that the role of the judge is limited . . . [judges are] to decide the cases before them, they’re not to legislate, they’re not to execute the laws.”⁶⁸ Roberts explained that, in the exercise of judicial review, “the Court has to appreciate that the reason they have that authority is because they’re interpreting the law, they’re not making policy.”⁶⁹ Roberts opined, “I don’t think the courts should have a dominant role in society.”⁷⁰

59. *Id.*

60. *See id.* at 158.

61. *Id.*

62. *Id.*

63. *Id.* at 55.

64. *Id.*

65. *Id.* at 409.

66. *Id.* at 180.

67. *See id.* at 158.

68. *Id.*

69. *Id.*

70. *Id.*

Taken together, the descriptions of judicial modesty by Posner, the pragmatist, and Roberts, the formalist, can be distilled into four elements. First, the modest judge is restrained in the exercise of power; that is, the modest judge avoids expressions that are unnecessary or without authority when he resolves controversies. Second, the modest judge is reluctant to interfere with the considered decisions of other legitimate authorities. Third, the modest judge is respectful of precedent and judicial tradition. Fourth, the modest judge appreciates the perspectives of colleagues as equals.

Modesty improves judicial decisionmaking and enhances the security of the judiciary in our constitutional structure. By exercising restraint, the modest judge employs judicial power only when duty demands, thereby reducing his risk of error. The deference of a modest judge enhances the reputation of the judiciary in the eyes of authorities that are needed to support the exercise of judicial power and that resent having their power usurped. The modest judge's respect for tradition strengthens the legitimacy of the judiciary as a neutral guardian of law. The modest judge's appreciation for collegiality makes him more productive, careful, and deliberative. Together these qualities remind us of Alexander Hamilton's description of the judiciary as the "least dangerous" branch because it exercises "neither FORCE nor WILL, but merely judgment."⁷¹

II. MODESTY FOR A CIRCUIT JUDGE

Judicial modesty is relevant to more than constitutional adjudication. Its qualities of restraint, deference, tradition, and collegiality are generally applicable to several components of the judicial function. Although neither the Chief Justice nor Judge Posner has suggested that judicial modesty is relevant to the topics that I will address, they both have addressed judicial modesty as pertaining to the adjudicative responsibilities of a judge. Indeed, the Chief Justice did not limit his remarks about modesty to the role of constitutional interpretation. Judge Posner also has written at length about the reasons for and against writing dissents, and his perspective is consonant with his call for modesty.⁷² Neither the Chief Justice nor Judge Posner has addressed judicial modesty as pertaining to the administrative responsibilities of judges, but the responsibility I will address—the employment of law clerks—goes to the heart of the daily work of a judge and is regulated by a policy recently adopted by the Judicial Conference. It is also a subject that Judge Posner has reviewed critically elsewhere.⁷³ In our daily grind at the circuit level, the topics I will address—dissents

71. THE FEDERALIST NO. 78 (Alexander Hamilton).

72. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 353–59 (1996).

73. *Id.* at 139–59.

from denials of rehearing en banc and hiring law clerks—are almost as controversial as methods of constitutional interpretation.

A. *The Immodest Dissent from a Denial of Rehearing En Banc*

To explain why dissenting opinions from denials of rehearing en banc are immodest, some background information about two matters is necessary. The first matter is whether and when a judge should write a dissenting opinion in the ordinary context of a decision by a panel of judges. The second matter is the process for deciding whether to rehear an appeal en banc and the process for deciding the appeal after rehearing is granted.

1. The Costs and Benefits of Ordinary Dissent

The consensus of circuit judges is that, in the regular work of a three-judge panel, a dissent should be reserved for an extraordinary circumstance. Some evidence is circumstantial; in virtually any term of a circuit court of appeals, the percentage of unanimous opinions is over ninety-five percent. There is also direct evidence in the comments of several judges. In a lecture several years ago, Judge Patricia Wald explained, “Most judges dissent reluctantly. A dissent makes no new law; it highlights one’s difference from a majority of colleagues, and it means extra, self-assigned work.”⁷⁴ The costs of dissent are so substantial that Judge Frank Coffin advises, in his book about judging, that “each member of an appellate court . . . give serious thought to when, why, and how to indulge oneself in a separate opinion in order to minimize any corrosive effect on underlying collegiality.”⁷⁵ While she served as a member of the D.C. Circuit, Justice Ruth Bader Ginsburg warned against frequent dissents and suggested “that jurists in the United States might serve the public better if they heightened their appreciation of the values so prized in the civil law tradition: clarity and certainty in judicial pronouncements.”⁷⁶

Clarity was the goal of the great Chief Justice John Marshall. In the early period of our Republic, the Supreme Court “followed the custom of the King’s Bench and the other common law courts: each Justice filed his own separate opinion.”⁷⁷ Chief Justice Marshall “established the system [the Court] currently use[s], whereunder one of the Justices announces an

74. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1412 (1995).

75. FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 224–25 (1994).

76. Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 150 (1990).

77. Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 34.

opinion ‘for the Court.’”⁷⁸ In the Marshall era, dissents “were very rare at first.”⁷⁹ Incidentally, as Justice Scalia has explained, Marshall’s custom “made Thomas Jefferson furious[,] . . . [as] the Court continued to come out with unanimous, pro-federal opinions written by Marshall”⁸⁰ after appointees by Presidents Jefferson and James Madison comprised a majority of the Justices.⁸¹

There is good reason for refraining from writing a dissent even when a judge thinks the majority is wrong. A cost-benefit analysis is appropriate. As Judge Posner explained,

Suppose that although a judge thinks he is right and the majority wrong, he also thinks it unlikely that his or any other court will, or perhaps even should, reopen the question in the foreseeable future. It may be one of those questions where it is more important that the law be settled than that it be got just right.⁸²

Posner counsels against hasty dissent because it “will communicate a sense of the law’s instability that is misleading; the decision is as solid a precedent as if it had been unanimous.”⁸³

A dissent, although fun to write, raises substantial costs for the workloads of both the writer in the majority and the one in dissent. The drafting process is more difficult for both writers, who must respond to each other’s drafts while considering the perspective of the judge who is not writing a draft. The costs are ordinarily outweighed by the benefits of the better end product, but the costs are real. On the circuit court of appeals, especially one with the heavy caseload of the Eleventh Circuit, judges are sensitive to these costs.

There are benefits to dissents besides the benefit of producing a better-reasoned opinion for the majority. In a lecture to the Supreme Court Historical Society, Justice Scalia explained that dissents “make[] it clear that these decisions are the product of independent and thoughtful minds, who try to persuade one another but do not simply ‘go along’ for some supposed ‘good of the institution.’”⁸⁴ Justice Scalia also explained,

When a judge of one of our Circuit Courts of Appeals dissents from an opinion of his colleagues, he warns the Courts of Appeals of the other twelve Circuits (who are not

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. POSNER, *supra* note 72, at 357.

83. *Id.*

84. Scalia, *supra* note 77, at 35.

bound by the *stare decisis* effect of that opinion) that they should not too readily adopt the same legal rule.⁸⁵

Justice Scalia “agree[d] that unanimity helped produce greater public acceptance”⁸⁶ of the decision in *Brown v. Board of Education*,⁸⁷ but he argued that “artificial unanimity—the suppression of dissents—deprives genuine unanimity of the great[er] force it can have when that force is most needed.”⁸⁸ I agree with that perspective, but I would respond to Justice Scalia that too-frequent dissent may diminish the force of a powerful dissent when it too is needed most.

I am an infrequent dissenter. In the more than four years that I have served on the Eleventh Circuit, I have written one partial dissent in an en banc appeal,⁸⁹ which was joined by three colleagues; one dissent in a published decision⁹⁰ of a three-judge panel; and two partial dissents⁹¹ out of the thousands of unpublished decisions of panels on which I have served. None of those appeals involved the hot-button issues of our time. The en banc partial dissent was about pleading securities fraud,⁹² and my other published dissent was in a bankruptcy appeal.⁹³ I dissented when my conscience compelled me to explain why I thought the decision of the majority was grievously wrong. There have been a few occasions when I refrained from dissent because the issue was close, reasonable judges could disagree, the precedent was workable, and the result was fair. In the interest of full disclosure, I have written two majority opinions over dissents in published decisions.⁹⁴

Perhaps my perspective about dissents will change in time. Justice Brennan delivered a lecture in the later part of his career entitled “In Defense of Dissents.”⁹⁵ He “confess[ed] that one reason [he] chose that title is that the sixteen opinions [he] wrote some twenty-seven years [earlier] during [his] first term on the Court did not include a single dissent. Of [his] fifty-six opinions [in the term before his lecture], forty-

85. *Id.* at 36.

86. *Id.* at 35.

87. *Id.* (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

88. *Id.*

89. *Weissman v. Nat’l Ass’n of Sec. Dealers*, 500 F.3d 1293, 1300–03 (11th Cir. 2007) (en banc) (Pryor, J., concurring in part and dissenting in part, joined by Black J., Marcus J., and Wilson, J.).

90. *In re Bracewell*, 454 F.3d 1234, 1247–59 (11th Cir. 2006) (Pryor, J., dissenting).

91. *Helms v. Gen. Dynamics Corp.*, 222 F. App’x 821, 834–838 (11th Cir. 2007) (Pryor, J., concurring in part and dissenting in part); *Gary v. Modena*, No. 05-16973, 2006 WL 3741364, at *17–22 (11th Cir. Dec. 21, 2006) (Pryor, J., concurring in part and dissenting in part).

92. *See Weissman*, 500 F.3d at 1300.

93. *See Bracewell*, 454 F.3d at 1247.

94. *CSX Transp., Inc. v. State Bd. of Equalization*, 472 F.3d 1281 (11th Cir. 2006), *rev’d*, 128 S. Ct. 467 (2007); *Silva v. U.S. Att’y Gen.*, 448 F.3d 1229, 1233, 1244 (11th Cir. 2006).

95. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427 (1986).

two were dissents.”⁹⁶ For now, my experience is more like the beginning of Justice Brennan’s tenure on the Supreme Court; the decisions of the Eleventh Circuit are usually agreeable to me. Justice Brennan also was in a predicament different from mine. The likelihood of dissent on the Supreme Court, which decides in a term fewer than 100 close cases that have already divided the courts of appeals, is far higher than on the circuit court of appeals, which decides in a term thousands of appeals, many of which are simple.

2. The Costs and Benefits of Rehearing En Banc

Now consider the en banc process, which is reserved for the aberrant circumstance of a rehearing that is “necessary to secure or maintain uniformity”⁹⁷ of decisions by the court or “involves a question of exceptional importance.”⁹⁸ An en banc hearing is “not favored”⁹⁹ because it imposes the heaviest cost on the workload of any court. After a three-judge panel has already incurred the substantial cost of reading the briefs, hearing oral arguments, reviewing the record, and writing an opinion, every judge of the court must repeat that process when an appeal is reheard en banc.

The process for deciding whether to rehear an appeal en banc also consumes substantial resources. Typically, a member of the circuit court who was not on the panel that decided the appeal asks the clerk to withhold issuance of the mandate until further notice.¹⁰⁰ That judge then writes a memorandum to the panel, with copies to every other member of the court, explaining why the judge objects to the decision of the panel and asking the panel to reconsider its decision. The panel responds, and if all goes badly, after a series of memoranda, the judge who held the mandate asks the Chief Judge to conduct a poll of the entire court to decide whether to rehear the appeal en banc. For the court to grant rehearing, a majority must vote for it.

If the court decides not to rehear the appeal en banc, then the Chief Judge enters an order that announces that decision. With increasing frequency over the last few decades, that order often is accompanied by one or more dissenting opinions and perhaps an opinion that concurs in the denial of rehearing en banc. The dissenting opinions ordinarily argue that the panel decision is wrong. The question I will address is why that kind of dissenting opinion is different from the ordinary dissent.

96. *Id.*

97. FED. R. APP. P. 35(a)(1).

98. FED. R. APP. P. 35(a)(2).

99. FED. R. APP. P. 35(a).

100. *See* 11TH CIR. R. 35, I.O.P. 4–9.

3. The Immodesty of a Dissent from Denial of Rehearing En Banc

A dissent from a denial of rehearing en banc is immodest. It is not an exercise of judicial restraint. It is not deferential toward legitimate authorities. It is not respectful of precedent and judicial tradition. It undermines collegiality.

A dissent from a denial of rehearing is not restrained because it is written by a judge who has no authority to decide that appeal. The only members of the court who have the authority and responsibility to decide that appeal are the members of the three-judge panel that actually decided the appeal. This kind of dissent is unlike the dissent of a judge who is a member of the panel that decided the appeal; the panel dissenter has a duty to express his opinion when the panel has reached a clearly wrong decision.

The dissenter from a denial of rehearing en banc is at a disadvantage in second-guessing the decision of the judges who had the authority to decide the appeal. The dissenter has studied the issue presented by the appeal, but the dissenter has not had the benefit of the ordinary process of deliberation and decision. The dissenter has not attended oral argument and asked probing questions of counsel.

When a judge has the authority to decide an appeal, he participates in a deliberative process that makes him better equipped to reach the correct decision, especially in a difficult appeal about an important issue that the court has decided to rehear en banc. After the panel has exercised its authority to reach a decision and the entire court has had the opportunity to consider that decision and the internal memoranda about whether to rehear the appeal en banc, the real work begins. The Chief Judge appoints a member of the original panel and a critic of the decision of the panel to serve as case managers who then define the issues presented, often in better terms than the lawyers who argued the appeal the first time. The briefs filed before the en banc court are often better than the original briefs because the attorneys are getting a second chance. The en banc process also is more likely to attract helpful briefs of amici curiae. The oral arguments are usually better in this second go-around. Most of all, the deliberation by an en banc court is much better than the ordinary deliberation of a three-judge panel. When the exceptional lawyers who are judges of a circuit court focus on a single or few appeals in a week set aside for en banc rehearsals, the quality of their deliberation is higher than the conferences of a three-judge panel that hears fifteen to twenty appeals in a week of oral arguments.

The process for deciding an appeal en banc makes a difference because it often changes minds. I have held a mandate, written in support of rehearing, and then, after rehearing, decided that the panel decision was correct after all. I have participated in an en banc rehearing in which the

court discovered a basis for a unanimous decision based on an aspect of the record that had been overlooked by both the panel and the member of the court who asked for a poll to rehear the appeal. I have witnessed an author of a panel decision change his mind after en banc rehearing. I have also held a mandate, argued for rehearing, and narrowly lost a vote to rehear the appeal en banc, but I have refused to file a dissenting opinion from the order denying rehearing.

When a judge dissents from an order denying rehearing en banc and expresses an opinion about how that appeal should have been decided, the dissenter writes both without the authority to decide that appeal and without the benefit of the reliable process for deciding an issue worthy of en banc rehearing. Flying solo in this circumstance increases the risk of error. That act is not restrained. It is more like having a scholar-in-residence provide academic criticism of the court, but that function is supposed to be performed externally by law professors and law reviews, not by judges.

One harsh critic of dissents from denials of rehearing en banc, Professor David McGowan, refuses to call these dissents “opinions”; he instead “call[s] them ‘en banc missives.’”¹⁰¹ He argues, “They are the judicial equivalent of a press release, or an open letter to the readers of the *Federal Reporter*.”¹⁰² He urges judges to use “law-school lectures . . . [for] abstract judicial rumination.”¹⁰³ I am trying to follow his advice here.

Professor McGowan’s objections remind me of a recent controversy from my home state of Alabama when a member of the Supreme Court of Alabama, Justice Tom Parker, published an op-ed in *The Birmingham News*¹⁰⁴ that lambasted his colleagues for faithfully applying the decision of the Supreme Court of the United States in *Roper v. Simmons*.¹⁰⁵ Justice Parker was disqualified from participating in the decision because he had represented the State as an attorney in an earlier stage of the litigation.¹⁰⁶ His op-ed was roundly and correctly criticized¹⁰⁷ for suggesting that the

101. David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 GEO. J. LEGAL ETHICS 509, 576 (2001).

102. *Id.*

103. *Id.* at 581.

104. Tom Parker, Op-Ed., *Alabama Justices Surrender to Judicial Activism*, BIRMINGHAM NEWS, Jan. 1, 2005, at 4B.

105. *Id.* (citing *Roper v. Simmons*, 543 U.S. 551 (2005)).

106. *Id.* (citing *Ex parte Adams*, 955 So. 2d 1106, 1107 (Ala. 2005)).

107. See, e.g., William H. Pryor Jr., *Not-So-Serious Threats to Judicial Independence*, 93 VA. L. REV. 1759, 1775–76 (2007) (noting that Parker’s “twisted ideas of opposing activist decisions by defying judicial decrees” failed when he was subsequently “trounced” in a Republican primary for Chief Justice of Alabama); Sandra Day O’Connor, Op-Ed., *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A18 (describing Parker’s reinterpretation of the Constitution’s Supremacy Clause as “bold” and troublesome); William H. Pryor Jr., Op-Ed., *Neither Force Nor Will, But Merely Judgment*, WALL ST. J., Oct. 4, 2006, at A14 (noting that Parker “catisgated his colleagues for following the ruling of the Supreme Court”); Tony Mauro,

state supreme court should not have followed the precedent of the Supreme Court of the United States, but that nonsense was not the only problem. It also was unseemly for a judge who had no authority to decide an appeal to publish an op-ed that attacked the decision of his colleagues, but that op-ed, I submit, was not altogether different from a dissent from a denial of rehearing en banc.

The dissent from a denial of rehearing en banc is not respectful of legitimate authorities, precedent, or judicial tradition. The dissent does not respect the decision of the original panel, which now represents the binding precedent for the circuit. The dissent does not respect the considered decision of the full court not to rehear the appeal. The dissent does not respect the time-honored rules of procedure that provide a legitimate but limited process for allowing all members to decide an exceptional appeal.

The first critic of en banc missives was one of the judicial legends of the last century. In 1960, Judge Henry Friendly of the Second Circuit wrote an objection to this practice that was joined by his colleague, Chief Judge Lumbard.¹⁰⁸ Judge Friendly wrote,

We feel obliged to note that the course which has brought this to us would mean that any active judge may publish a dissent from any decision, although he did not participate in it and the Court has declined to review it *en banc* thereafter, a practice which seems to us of dubious policy especially since, if the issue is of real importance, further opportunities for expression will assuredly occur.¹⁰⁹

In 1992, Judge Raymond Randolph of the D.C. Circuit, a former clerk to Judge Friendly, agreed with his former boss and wrote that “denials of rehearing *en banc* are best followed by silence. They should not serve as the occasion for an exchange of advisory opinions, overtures to the Supreme Court, or press releases.”¹¹⁰

Since Judge Friendly’s early protest, en banc missives have appeared with such increasing frequency that one could argue that these missives are now the established tradition.¹¹¹ After all, both the leading advocates

Alabama Judge Declares War on U.S. Supreme Court, LEGAL TIMES, Mar. 3, 2006, <http://www.law.com/jsp/article.jsp?id=1141293914878> (quoting one of Parker’s fellow justices, who remarked that “Parker’s column was ‘an unprecedented attack by a member of the Supreme Court on each fellow justice and an attack on the court as an institution’”).

108. *United States v. N.Y., New Haven & Hartford R.R.*, 276 F.2d 525 (2d Cir. 1959) (Friendly, J., concurring in denial of reh’g en banc, joined by Lumbard, C.J.), *overruled in part by Chappell & Co. v. Frankel*, 367 F.2d 197 (2d Cir. 1966).

109. *Id.* at 553.

110. *Indep. Ins. Agents of Am. v. Clarke*, 965 F.2d 1077, 1080 (D.C. Cir. 1992) (statement of Randolph, J.).

111. See Indraneel Sur, *How Far Do Voices Carry: Dissents from Denial of Rehearing En*

for judicial modesty, Chief Justice Roberts, when he was a circuit judge,¹¹² and Judge Posner,¹¹³ and many other distinguished jurists have published en banc missives. Even the circuit judge for whom I clerked, John Minor Wisdom, published an en banc missive.¹¹⁴

The best reply to that argument I can offer is twofold. First, I am glad to follow in any tradition that Judge Friendly started. Judge Wisdom once wrote, in a tribute to Judge Friendly, “Within my lifetime, except for the giants (Holmes, Brandeis, and Cardozo) and possibly Learned Hand, no federal appellate judge has commanded more respect for his opinions and his writings than Henry Friendly.”¹¹⁵ I would add to Judge Wisdom’s observation that Chief Justice Roberts began his distinguished career as a law clerk to Judge Friendly. Second, there are many distinguished federal judges, besides Judge Randolph, who still do not file en banc missives and, although their silence is understandably less noticed, their good example is worth emulating.

The last thing I would add is that en banc missives do not promote collegiality. After a circuit court has expended considerable resources and declined to rehear an appeal en banc, the author of a missive spends even more of our most precious resource—time—drafting the missive. Sometimes other judges respond to the missive and spend considerable time on that exercise. I have done it reluctantly when I served on the original panel.¹¹⁶ I have defended the panel decision against misconstruction because attorneys are prone to citations of missives in briefs and petitions, and the concurring opinion sets the record straight as it is printed after the order of denial of rehearing and immediately before the missive.

An age of judicial modesty should mean fewer en banc missives. Orders denying rehearing en banc would be important to the litigants, but not opportunities for judicial grandstanding. Criticism would come from the Bar and scholars while the judiciary would move on to the appeals of other litigants. The duty of the judiciary is to resolve the disputes of those

Banc, 2006 WIS. L. REV. 1315, 1317 (“[D]issents from denial of rehearing en banc are now routine . . .”).

112. *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of reh’g en banc).

113. *Wallace v. City of Chi.*, 440 F.3d 421, 430–34 (7th Cir. 2006) (Posner, J., dissenting from denial of reh’g en banc).

114. *Novak v. Beto*, 456 F.2d 1303, 1304–09 (5th Cir. 1972) (Wisdom, J., dissenting from denial of reh’g en banc, joined by Goldberg, J., and Simpson, J.).

115. John Minor Wisdom, *Views of a Friendly Observer*, 133 U. PA. L. REV. 63, 63–64 (1984).

116. *United States v. Williams*, 472 F.3d 835, 835 (11th Cir. 2006) (Black, J., concurring in denial of reh’g en banc, joined by Carnes, J., Marcus, J., and Pryor, J.); *Underwood v. Perry County Comm’n*, 452 F.3d 1258, 1259 (11th Cir. 2006) (Carnes, J., and Pryor, J., concurring in denial of reh’g en banc); *United States v. Levy*, 391 F.3d 1327, 1328 (11th Cir. 2004) (Hull, J., concurring in denial of reh’g en banc, joined by Anderson, J., Carnes, J., and Pryor, J.).

litigants, and the litigants should not be used as pawns for publishing op-eds disguised as judicial opinions.

B. *The Modest Limitation of Career Law Clerks*

In contrast with the immodesty of en banc missives, the federal judiciary recently has promoted judicial modesty on the administrative front. Last year, as part of a long-term strategy of cost containment, the Judicial Conference adopted a policy that limits every federal judge to the employment of no more than one career law clerk.¹¹⁷ All other law clerks must be employed for a term of one or a few years.¹¹⁸ I am a member of the Judicial Resources Committee, which recommended this policy to the Conference.¹¹⁹ The proposal generated substantial controversy¹²⁰ but was adopted by a wide margin of the Judicial Conference.¹²¹

Because it is administrative, the new policy about hiring law clerks cannot be evaluated for judicial modesty in the same way that an adjudicative policy can be evaluated. A judge's administrative responsibilities are different but not separate from the process of adjudication. Administrative policies still affect adjudication, inter-branch conflict, and collegiality. We should evaluate an administrative policy for modesty based on its use of judicial resources and its effect, however indirect, on adjudication.

Several years ago, Judge Posner wrote candidly about the adjudicative costs of the rise of the law clerk in the federal judiciary.¹²² He explained that the increased reliance on law clerks for the drafting of opinions makes judicial opinions more uniform in style,¹²³ longer,¹²⁴ less candid,¹²⁵ and less credible.¹²⁶ He lamented some aspects of this increased "bureaucracy"¹²⁷ but acknowledged, "The law clerk is here to stay."¹²⁸

117. Report of the Proceedings of the Judicial Conference of the United States, 24–27 (Sept. 18, 2007), available at <http://www.uscourts.gov/judconf/proceedingsSept07.pdf>.

118. *Id.* at 26.

119. *Id.* at 21; Report of the Judicial Conference Committee on Judicial Resources to the Chief Justice of the United States and Members of the Judicial Conference of the United States 32–34, Appendix B-21-31 (Sept. 2007); see also *Cost Containment and the Federal Judiciary*, THE THIRD BRANCH, Oct. 2007, <http://www.uscourts.gov/ttb/2007-10/cost/index.html>.

120. Pamela A. MacLean, *Law Clerk Cost-Cutting Has Judges Up in Arms*, NAT'L L.J., Sept. 4, 2007, available at <http://www.law.com/jsp/article.jsp?id=900005557087>.

121. See Joe Palazzolo, *Judicial Conference Votes to Curb Career Clerks*, LEGAL TIMES, Sept. 19, 2007, available at <http://www.law.com/jsp/article.jsp?id=900005557386>.

122. See POSNER, *supra* note 72, at 139–59.

123. *Id.* at 145–46.

124. *Id.* at 146–47.

125. *Id.* at 147–48.

126. *Id.* at 148–49.

127. *Id.* at 156.

128. *Id.* at 158.

The policy of relying primarily on term, not career, law clerks should limit the costs identified by Judge Posner and contain the exercise of judicial power. A regular turnover in less experienced law clerks will require circuit and district judges to spend more of their time crafting judicial opinions. When there is a regular turnover of law clerks who work for brief terms, judges necessarily will rely on them primarily for research and drafting. The new policy will make less likely the reliance on career staff to perform the judicial role. Term law clerks also are bureaucrats but, as Judge Posner described them, “fortunately, industrious and highly intelligent ones”¹²⁹ less prone to the staleness of an entrenched bureaucracy. A predominance of term clerks is more likely to maintain this beneficial character.

The new policy of limiting career law clerks also is an exercise of fiscal restraint. Career law clerks are costly. Their annual salaries are ordinarily around \$100,000,¹³⁰ and career clerks are “eligible to participate in all benefit programs offered to judiciary employees, including health, dental, vision, and life insurance coverage, retirement benefits, judiciary supplemental benefit programs and the Thrift Savings Plan.”¹³¹ Term clerks are paid annual salaries of \$50,000 to \$80,000¹³² and are not allowed most other employee benefits.

This policy of fiscal restraint is respectful of the legitimate needs of other authorities within and without the judiciary. “[T]here has been substantial growth in the number of career law clerks,”¹³³ but the costs of judicial chambers are not the only cost of the judiciary. There are court clerk’s offices, unit executives, probation services, libraries, rent, construction of new buildings, and other expenses. Stewardship regarding the costs of chambers frees resources for the other responsibilities of the federal judiciary. Cost containment for the judiciary also assists Congress and the Executive in managing the federal budget in a time of war and budget deficits. This stewardship also may assist the Chief Justice in his effort to persuade Congress to increase judicial salaries.¹³⁴

The curtailment of career clerks respects judicial tradition. “The hiring of distinguished recent law school graduates to serve as federal judges’ law clerks for a year or two became the general practice in the 1930s.”¹³⁵ “The Judicial Conference officially recognized career law clerks in

129. *Id.* at 156.

130. Palazzolo, *supra* note 121.

131. Online System for Clerkship Application and Review, Qualifications, Salary and Benefits, <http://oscar.dcd.uscourts.gov/law-clerk-benefits>.

132. Palazzolo, *supra* note 121.

133. Report of the Proceedings of the Judicial Conference of the United States, *supra* note 117, at 26.

134. John G. Roberts, Jr., *2006 Year-End Report on the Federal Judiciary*, THE THIRD BRANCH, Jan. 2007, <http://www.uscourts.gov/ttb/2007-01/2006/index.html>.

135. POSNER, *supra* note 72, at 139.

1968,”¹³⁶ but “[i]n 1978 the Judicial Conference adopted a resolution stating that the best interests of the judiciary are served through continuation of the traditional practice of appointing recent graduates as law clerks for periods of one to two years.”¹³⁷ That tradition serves the judiciary well, as the brightest of recent graduates of American law schools spend a year or two employed in public service at modest salaries. Many federal judges began their careers this way; half the current active judges of the Eleventh Circuit, for example, started their legal careers as term law clerks in the federal judiciary. This tradition serves the interests of the Bar, as law clerks soon become leading practitioners, and those leading practitioners in turn become influential ambassadors for the federal judiciary. This tradition also serves the interests of law schools, as top graduates are hired by judges and former clerks become professors.

The limitation of career law clerks promotes collegiality by treating judges as equals. One of the problems of allowing multiple career law clerks per chambers is “greater disparity in costs from one chambers to another.”¹³⁸ The policy of allowing one career clerk per chambers reduces that disparity, but it allows bankruptcy judges and magistrate judges, who have small staffs and a smaller pool from which to hire, the benefit of a career law clerk. The policy also allows the senior judges in the circuit and district courts to employ a career clerk for their smaller staffs. These semi-retired judges perform substantial work for the judiciary, but they too hire from a smaller labor pool. Active Article III judges, who employ multiple clerks, in contrast, will be served well by continuing to draw from a national pool of top talent.

III. CONCLUSION

In 1996, Judge Posner wrote that we “may be living in the golden age of the federal appellate judiciary. There may never have been a time when so large a fraction of federal judges were outstanding.”¹³⁹ In 2008, it is still yet to be seen whether this golden age will be recognized also as an age of judicial modesty. To achieve that end, judges will all need to learn from the examples of the giants of the last century like Judge Friendly. Their examples of judicial restraint, deference to other legitimate authorities, respect for precedent and judicial tradition, and commitment to collegiality light our path. The time for following their examples is ripe.

136. Report of the Judicial Conference Committee on Judicial Resources, *supra* note 119, at Appendix B-22.

137. Report of the Proceedings of the Judicial Conference of the United States, *supra* note 117, at 26.

138. *Id.*

139. POSNER, *supra* note 72, at 150.