

## Activists Vote Twice

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Judicial activism has a bipolar press. It is widely extolled, and widely decried, often by the same people. Academic commentators see it as pervasive, the de facto norm in judicial determinations. Rarely, however, do they accept judicial activism with detached equanimity. More often, when a high-profile decision cuts against their preferential grain, they denounce it; and when it promises to advance their favored vision of the future, they wax rhapsodic.

Critics of judicial activism assail it as a corruption of the judicial function, a substitution of judicial will for the outcome of political consensus, hence antimajoritarian and undemocratic. A refrain during the Warren era was that the courts had usurped other functions of government: they were running school systems, apportioning political districts, fine-tuning law enforcement down to the very words read to suspects, abetting the murder of innocent babies, and more. With shifting electoral tides and the alea of judicial mortality, the tune changed, and was sung by a new chorus. In recent years, the courts have been charged with “conservative activism.” This charge impounds the additional vice of hypocrisy, because among the judges viewed as perpetrators of conservative activism are once and present proponents of judicial restraint.

What follow are some thoughts on judicial activism. To give them focus, I will consider two recent Supreme Court decisions. One of them, *Bush v Gore*, 531 US 98 (2000), was immediately identified as an imperious stroke and demonized as judicial power run riot. The case attracted the full battery of epithets often directed at judicial activism. A “judicial coup,” “corrupt decision,” are two that come to mind. A dissenting Justice wrote that the decision would imperil the “Nation’s confidence in the judge as an impartial guardian of the rule of law” (p 129).

The other decision, *Clinton v Jones*, 520 US 681 (1997), raised few hackles on this score. It was noticed, to be sure, because the appellant had a high public profile, but not especially as an instance of judicial overreaching.

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In my view, these responses are no more than half right. *Bush v Gore* does have hallmarks of an exercise in judicial activism. Quite possibly, five Justices wanted to nail down their preferred candidate's win in Florida. The legal theory propounded to this end is somewhat tortured (although it would have delighted the decision's most ardent critics had it favored someone they consider worthy). But *Bush v Gore* pales next to *Clinton v Jones* as an extension of judicial power beyond the legitimate bounds of law. The forensic manipulation in the latter case, to boot, is more egregious.

In addition to dispeptic observations about these recent cases, I have a broader point. The process of adjudication itself creates pressure toward judicial activism. The reason, as expounded more fully below, is that when activists and adherents of judicial restraint sit on the same court, there is effectively a shift of power from the latter to the former.

First, though, I should define the terrain. By judicial activism I mean the decision of cases according to the judges' preferences. Its opposite, for present purposes, is adjudication according to neutral principles without regard for preference. An activist judge, in other words, gives effect to preference over the objective meaning of the law when they conflict. A neutralist follows the law without regard to personal preference. Other terms describing these approaches, although with considerably different resonances, are "result orientation" and "tendentiousness" for judicial activism, and "judicial restraint," "strict constructionism," and "adjudication on the merits" for its opposite. Here I will call the former "activism" or "preference," and the latter "neutralism" or "adjudication on the merits." These terms surface periodically in judicial determinations and ubiquitously in academic commentary.

An idea that flared briefly among legal academics in the 1970s and 80s (and still flickers ever so faintly today) was that all judicial actions necessarily reflect ideology, temporal contingency, and confluences of class, race, sex, and childhood trauma. If this or something similar is your world view—that is, you believe neutral adjudication on the merits to be inherently impossible—you can stop reading now. What follows will mean nothing to you. My postulate here is that in a considerable number of cases there is an objectively neutral ground of decision other than the judge's pure preference or ideological atavism. Another way of putting this is that the proverbial intelligent Martian who brought no preferences to bear (because the sort of thing that shivers its timbers is out of this world) would conclude that some outcomes were more strongly supported by a discernible ground in law than others.

At the opposite pole from the academic postmodernists, judicial activism itself does not wear its heart on its robe. The official, or at least self-asserted, standard of judicial action acknowledges only objectively grounded determinations. Judges habitually profess to be neutralists, and almost all would disavow naked preference as a fulcrum of decision. You will find in published opinions many more disclaimers like “I might prefer another outcome but the law compels this one,” than outbursts like “The law may compel another outcome but, heck, I prefer this one.” Academic folk, for their part, bring a jaded wariness to proclamations of judicial neutrality, regarding them (and there is ever-renewed grist for this view) as conventional pieties of the sort that all express and none believes, akin to the main goal of literary edification sometimes asserted by readers of men’s magazines.

The question remains: why? Or more discursively, why is activism—preference, essentially—so common a basis of adjudication? Some reasons come immediately to mind. People naturally accord transcendent value to their own preferences and wouldn’t want to withhold their benefit from humanity. Perhaps too, as in the song, judges just want to have fun. On an absolute scale, to be sure, judicial activism may not be as much fun as, say, skydiving. But I have little doubt that compared to the alternative of self-effacing pursuit of neutral grounds of adjudication, issuing judicial thunderbolts is more fun.

To observe human propensities, however, falls short of a systematic account of judicial activism. An additional and decisive element in the story is the process of adjudication itself. A single judge who decided all cases might, unsurprisingly, allow personal preference to shape their outcomes. But that would not be foreordained. This single judge might have a strong conviction about judicial detachment, or might derive satisfaction from hewing closely to neutral grounds of decision. One could, to be sure, impute to such a judge a preference of a sort—for judicial restraint—but the resulting body of decisions would not have the look and feel of judicial activism.

In the actual process of adjudication, where appellate cases are decided by several judges, a judge who subordinates preference to neutral principles loses power to judges who are less restrained. This, I believe, draws out judicial activism, which in any event is rarely far below the surface. To illustrate this point, consider the following schema.

Imagine a court with two judges, H. Dumpty and D. Quixote. Judge Dumpty decides all cases according to his preferences (i.e., is an unalloyed activist); Judge Quixote decides all cases on the merits (i.e., is a pure neutralist). Cases are decided by majority vote, which here means unanimity. Cases where the two judges vote differently are resolved by coin toss.

This array may strike you as so contrived as to be thoroughly unilluminating. With some added texture, however, it is not unlike a real tribunal. Imagine a nine-member court, on which four judges are hardcore activists and four other judges strive toward neutral decisions. Further, the four activists have similar preferences across a broad range of cases. The ninth judge is a wild card. This judge is somewhat muddle-headed and finds it difficult to follow an analysis to its conclusion, being easily diverted from a course of reasoning by some extraneous and unpredictable element. There have been arrays comparable to this on the United States Supreme Court within living memory.

Returning to our imaginary two-judge court, suppose that of 100 cases, 50 have outcomes on the merits that match Judge Dumpty's preferences while the other 50 have outcomes on the merits matching Judge Quixote's. Judge Dumpty in all 100 cases votes his preferences. Judge Quixote votes the same way in the 50 cases where the merits and Judge Dumpty's preferences coincide. These 50 cases are therefore decided in accordance with Judge Dumpty's preferences. In the other 50 cases (where Judge Dumpty's preferences and the merits diverge) Judge Quixote votes the other way, and the cases are decided randomly, 25 for each side. Thus, of 100 cases, 75 are decided according to the activist judge's preferences and only 25 according to the neutralist's. Judge Dumpty's preferences have determined the outcome of many more cases than Judge Quixote's (who by hypothesis has subordinated his preferences to a neutral standard of decision).

As this simple matrix suggests, activists have more votes in effect (or perhaps I should say more effective votes) when there are also neutralists on the bench. This is what I mean by activists vote twice. It is also why there are so few neutralists. Sooner or later Judge Quixote will tire of tilting at Judge Dumpty's preferences, and start voting his own. If we assume a more fully modulated environment, the pressures remain the same. A pure rigorist cannot bargain or logroll. A judge who unwaveringly pursues a neutral ground has nothing to trade. In order to be a player, Judge Quixote must barter away some neutrality for outcomes. It comes down to a matter of turf. If a judge who subordinates preference to neutral principles sits on the same bench with a judge who always follows preference, the former loses ground to the latter.

Adjudication by neutral principles, furthermore, gets little if any reinforcement from academic quarters. Being inclined no less than others to identify eternal verity with their own preferences, legal scholars are quick to dispense adulation or contumely to judicial actions that advance or thwart their vision of the future. This kind of attention, even when adverse, is likely to reinforce judges' activist pro-

pensities. Since most people like attention, it functions as a reward of sorts for judicial activism. I don't want to make too much of this admittedly minor element, but at a minimum it seems likely that any influence from the academic world would sooner encourage than inhibit a willful judge. Which is more plausible: that the majority Justices in *Bush v Gore*, chastened by the outpouring of ink decrying their action as lawless, become paragons of judicial restraint? or that in some future iteration of the same case, with the political colors of the parties reversed, both the Justices' votes and the thrust of sidebar commentary are symmetrically reoriented?

*Bush v Gore*, in any event, was immediately and widely scourged as the marquee instance of judges muscling their way to a favored outcome. As I mentioned earlier, however, I think *Clinton v Jones* has claim to higher billing in this regard.

Since *Clinton v Jones* has been largely eclipsed by later events, let me remind readers that in that case the Supreme Court held unanimously that a sitting President is subject to a civil action brought by a private person and accordingly to the associated arsenal of compulsory process. I have written on the merits of this question elsewhere and will try to contain myself here. That said, I find both broadly structural and narrowly technical reasons for doubt on *Clinton v Jones*, which seems to me weakly grounded both in law and common sense. What is more, the decision is as good an illustration of judicial overreaching as I know.

First, the entire executive power of the United States resides in the President. To expose the President personally to judicial compulsion (particularly at the instance of a private person) might prove a serious impairment of that power. Unlike any other executive officer, or a minister (even a premier) in a parliamentary system, the President cannot be replaced if subject to constraint by a court.

A narrower focus on the question adds force to this broad point. It is hard to see how a civil action can proceed against the President, ultimately, without the possibility of arrest and detention in the event the President refuses to submit. If we assume to the contrary that a sitting President cannot be arrested or indicted—and that is the common view of the matter—then a civil judgment and possible contempt citation are essentially hortatory. Or at least they are unless Congress impeaches. In one branch of corollaries, therefore, impeachment is the backstop of private lawsuits against the President. If, on the other hand, we accept the possibility implicit in *Clinton v Jones* that the President *is* subject to arrest, indictment, and imprisonment, the consequences are more unnerving. Even if indicted or imprisoned, the President is still the President, holding the full battery of powers including the pardon power. On this branch as well, therefore, lest the

President spring himself from jail, Congress must impeach. All this to make sure that some civil plaintiff—who in *Clinton v Jones* turned out to be dangling on strings pulled by a cadre of ideologues—doesn't have to wait until the end of the President's term to obtain satisfaction.

For reasons of this order, and others, it was obvious from the start that a sitting President ought not routinely to be subject as an individual to judicial power. In the Constitutional Convention of 1787 the debate on presidential impeachment is unfathomable without the essential predicate that the President personally is not subject to the power of the courts. A generation later this was still common ground, as revealed by an observation of Joseph Story in his *Commentaries on the Constitution*. In order to give the Supreme Court its due, let me present Story's comment exactly as the Court does in *Clinton v Jones*:

Story wrote that because the President's "incidental powers" must include "the power to perform [his duties], without any obstruction," he "cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability" (pp 695–96 n 23).

It would be hard to make the point more straightforwardly, or more strongly. Story accords to the President's person an official inviolability in civil cases. That means no civil actions, doesn't it? Apparently not, after the Court works its way. The Court slaps Story right into line:

Story said only that "an official inviolability," . . . was necessary to preserve the President's ability to perform the functions of the office; he did not specify the dimensions of the necessary immunity. While we have held that an immunity from suits grounded on official acts is necessary to serve this purpose . . . it does not follow that the broad immunity from all civil damages suits that petitioner seeks is also necessary (Id).

Thus we are to understand Story's reference to the "official inviolability" of the President's person "in civil cases" as leaving the President subject to private lawsuits because "official inviolability" does "not specify the dimensions of the necessary immunity." You could have fooled me. Without the Court's explanation I would have understood Story's terms as specifying exactly the dimensions of the necessary immunity. It is absolute, because inviolability is an absolute. And I am not the only one who understands inviolability in this manner. Hamilton, in Federalist 69 describes the King of England as "inviolable,"

with the explanation that “there is no constitutional tribunal to which he is amenable,” in contrast to the President of the United States, who is subject to impeachment for crimes. For Story, however, as filtered through the Supreme Court in *Clinton v Jones*, the “official inviolability” of the President’s person in “civil cases” apparently means “except in private tort actions.”

It may seem to you that I overstate the Supreme Court’s misapprehension of Story’s meaning. But there is confirmation of the different meaning I ascribe to Story’s comment in a contemporaneous pronouncement of the Supreme Court itself. In an 1838 decision, *Kendall v United States*, 37 US (12 Peters) 524 (1838), the majority opinion contains the matter-of-fact observation, as though self-evident, that

[t]he executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power (p 610).

This is the same point as Story’s, with the explicit corollary that impeachment is the only form of official power that can be imposed directly on the President. And Story himself was in on it. Justice Story participated in the decision of the *Kendall* case, subscribing to the majority opinion without demur.

My point here, I should underscore, is not that the Supreme Court was bound to follow Story’s *Commentaries* or its own dictum from *Kendall v United States* as talismanic authority, or even that *Clinton v Jones* was wrongly decided (although I am quite sure that it was). What the Court’s handling of Story’s comment reveals is that Story does not function in the opinion as authority, but only as a forensic hurdle to be knocked over. Story may have come for analysis, but got a massage.

Which brings me to my actual point. The Court could brush off Story’s comment with the back of the hand (and suppress entirely its own dictum from *Kendall*) because it was unnecessary to assert compelling grounds in *Clinton v Jones*. There was no other side in this case, no contest of preferences among the Justices. *Clinton v Jones* is about the boundaries of judicial power. When judges of differing preferences participate in the same cases the boundaries of their respective power are shaped by their propensity to activism. A neutralist who is so unguarded as to stay that particular course accords to the activists an extra vote or two. In a case like *Clinton v Jones*, which frames the boundaries of the judicial power in relation to *other* powers of government, they are all activists. In choosing between more power or less, preference leans heavily toward more. Perhaps I should call this meta-activism, because it overrides different preferences on other

matters. The Justices may not agree on whom they want as President of the United States, but they all want the President to say “how high?” when they say “jump!”

Before closing let me draw out for the reader a few of the ironies that teem in these two cases. *Bush v Gore* was viewed by many as a case in which the Supreme Court decided a presidential election. But in the end it probably made no difference. The vote count might still have gone for Bush. What is more, in any course of events in which the final say on the outcome of the Florida vote went to the Florida legislature, Bush was a sure winner. It may not have struck you right off, but the effect of *Clinton v Jones* on presidential destiny—including Al Gore’s—quite likely was greater. Imagine for a daydreaming moment that the Supreme Court decided *Clinton v Jones* with a sober and appropriately restrained appreciation of the legitimate bounds of its power, and denied the possibility of a civil tort action against a sitting President. There followed, perforce, no deposition by the defendant, no loaded question fed to Jones’s lawyers by a trippster, no perjury, no impeachment, no nothing. Then, perhaps—who knows?—Gore wins clean in 2000. So, while Bush may have won Florida five to four, *Clinton v Jones* may have set Gore up nine to nothing. If I were Al Gore I would be plenty sore at the Supreme Court, but no less for *Clinton v Jones* than for *Bush v Gore*.

I have noted elsewhere the irony that the judicial instrument giving President Nixon the final push from office in 1974, to the great glee of Clintons and future Clintonites, molted into the deposition ordered by a court in *Clinton v Jones* over which the President tripped. As a connoisseur (or at least avid consumer) of irony I could hardly have hoped for a third act: a close vote in Florida, ending in near-equipoise (quite plausibly as a remote effect of *Clinton v Jones*) and giving the Supreme Court another bite at unmaking a President.

I could go on, but by now surely you’ve gotten my drift. For those who decry *Bush v Gore* as judicial activism unbridled, however, I do have two more words: nobody cares. And least of all, you. If Florida had gone narrowly for Gore in 2000 and the Supreme Court had upheld the win against the exact mirror image challenge from Bush—invoking equal protection of the laws not to ox your Gore but to anoint him—I am sure I could count on you to extoll the Court’s action as one of high judicial statemanship.<sup>1</sup>

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<sup>1</sup> Note to Justice Stevens: For an extension of judicial power beyond reasonable (and constitutional) bounds, see *Clinton v Jones*, 520 US 681 (1997).