

2/15/2007

APPEARANCE, AND REALITY
A CONSERVATIVE VIEW

INTRODUCTION

I WILL ADVANCE THE PROPOSITION TODAY THAT OUR CURRENT PREOCCUPATION WITH APPEARANCE-BASED POLITICS AND ETHICS IS WITHOUT FOUNDATION IN COMMON SENSE AND IS, IN FACT, PERNICIOUS, COUNTER-PRODUCTIVE, AND PERVERSE.

THE APPEARANCE STANDARD: AN EXAMPLE

LET ME BEGIN WITH AN EXAMPLE. THE MICHIGAN CODE OF JUDICIAL CONDUCT STATES IN CANON 2 THAT:

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. *A judge must avoid all impropriety and appearance of impropriety.* A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly..

THE MARSHALL PLAN

WITH THIS LANGUAGE IN MIND, LET US ASSUME THAT AN OUTGOING PRESIDENT OFFERS UP THE NAME OF A CABINET OFFICER IN HIS ADMINISTRATION AS CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT. ASSUME FURTHER THAT THE SENATE APPROVES THE APPOINTMENT AND THAT THE NOMINEE IS PROMPTLY SWORN IN. TO MAKE LIFE MORE INTERESTING, HOWEVER, ASSUME THAT THE NEW CHIEF CONTINUES TO SERVE AS A HOLDOVER CABINET OFFICIAL *AFTER* HIS APPOINTMENT AND THAT CERTAIN COMMISSIONS FOR JUSTICES OF THE

PEACE ARE MADE OUT IN HIS CABINET OFFICE BUT THAT SOME COMMISSIONS ARE NOT DELIVERED BEFORE THE NEW PRESIDENT TAKES OVER. ASSUME, FINALLY, THAT IMMEDIATELY AFTER TAKING OFFICE, THE NEW PRESIDENT ORDERS HIS NEW SECRETARY OF STATE TO HOLD UP THE UNDELIVERED COMMISSIONS, WHEREUPON, OF COURSE, LITIGATION ENSUES.

OBVIOUSLY, THIS IS NOT A HYPOTHETICAL AT ALL. RATHER, IT IS *MARBURY V MADISON*, IN WHICH THE FORMER SECRETARY OF STATE AND THEN THE FOURTH CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT JOHN MARSHALL, WRITING FOR A UNANIMOUS COURT, ENUNCIATED THE BASIC PRINCIPLE THAT THE FEDERAL JUDICIARY IS SUPREME IN THE EXPOSITION OF THE LAW OF THE CONSTITUTION.

JUSTICE MARSHALL IS TODAY WIDELY REGARDED AS THE GREATEST JUDICIAL FIGURE IN OUR NATION'S HISTORY. CONSIDER, HOWEVER, WHAT WOULD HAVE HAPPENED IF MARSHALL HAD BEEN SUCCESSFULLY HELD TO A STANDARD THAT REQUIRED THAT HE AVOID NOT ONLY ANY IMPROPRIETY BUT ALSO THE *APPEARANCE* OF ANY IMPROPRIETY.

QUITE CLEARLY, MARSHALL WOULD HAVE BEEN REQUIRED, UNDER AN APPEARANCE STANDARD, TO RECUSE HIMSELF FROM ANY PART IN THE CONSIDERATION OF *MARBURY V MADISON*. ATER ALL, MARSHALL HAD BEEN INVOLVED IN THE APPOINTMENT OF THE VERY MAN—MARBURY—UPON WHOSE CASE HE WAS NOW RULING. FURTHER,

MARSHALL WAS A STRONG FEDERALIST—IN TODAY’S TERMINOLOGY AN “AVID PARTISAN”—AND A POLITICAL FOE OF THE NEW PRESIDENT, THOMAS JEFFERSON. FINALLY, AS NOTED BY WILLIAM W. VAN ALSTYNE IN HIS EXCELLENT ARTICLE IN THE DUKE LAW JOURNAL, PROOF OF THE STATUS OF MARBURY’S COMMISSION NOT ONLY INVOLVED CIRCUMSTANCES WITHIN THE CHIEF JUSTICE’S PERSONAL KNOWLEDGE, IT WAS ACTUALLY FURNISHED IN THE SUPREME COURT BY HIS YOUNGER BROTHER WHO HAD BEEN WITH MARSHALL IN THE SECRETARY OF STATE’S OFFICE WHEN HE MADE OUT MARBURY’S COMMISSION!

UNDER AN APPEARANCE STANDARD, THEREFORE, MARSHALL WOULD HAVE BEEN OFF THE CASE AND PERHAPS OUT OF A JOB. NEVERTHELESS, THE OFTEN OVERLOOKED POINT ABOUT THE CASE REMAINS: WHILE ENUNCIATING THE DOCTRINE OF JUDICIAL SUPREMACY ON MATTERS OF CONSTITUTIONAL LAW, MARSHALL’S OPINION ACTUALLY HELD THAT THE SUPREME COURT WAS WITHOUT JURISDICTION AND MARBURY THEREFORE WAS LEFT TO SEEK HIS REMEDY ELSEWHERE.

IN OTHER WORDS, THE CASE ACTUALLY TURNED ON THE PRINCIPLE OF SEPARATION OF POWERS. THUS, IN THE WORDS OF JAMES M. O’FALLON, THE DECISION “WAS IN SERVICE OF MARSHALL’S DUAL OBJECTIVES OF ESTABLISHING JUDICIAL REVIEW WHILE AVOIDING DIRECT CONFLICT WITH JEFFERSON OVER ENFORCEMENT OF THE COURT’S MANDATE.”

THUS, MARSHALL ROSE ABOVE APPEARANCES AND DEALT WITH REALITY, BOTH POLITICAL AND LEGAL. WHILE THE CYNICAL MIGHT CONTEND THAT MARSHALL SACRIFICED A PAWN (THE NARROW QUESTION OF JURISDICTION) TO TAKE A QUEEN (THE BROAD PRINCIPLE OF JUDICIAL REVIEW) I WOULD ARGUE THAT THE SYSTEM “WORKED” AND THAT IS WHY JOHN MARSHALL BECAME A JUDICIAL LEGEND. THE POINT HERE IS THE DOG THAT DIDN’T BARK: DESPITE THE STRONG APPEARANCE OF IMPROPRIETY, MARSHALL ACTED HONORABLY AND EQUITABLY, RISING ABOVE HIS POLITICAL PREFERENCES AND HIS PERSONAL INVOLVEMENT TO ACHIEVE A HISTORICALLY “RIGHT” RESULT.

“IT’S EITHER VALJEAN OR JAVERT”

BUT LET ME MOVE AWAY FROM THE JUDICIAL CONTEXT, LEST I BE ACCUSED OF BEING OVERLY SELF-INTERSTED. CONSIDER THE LITERARY REALM. ALL OF YOU, I AM SURE, REMEMBER VICTOR HUGO’S PANORAMIC NOVEL OF FRANCE BETWEEN THE TWO BONAPARTES, LES MISERABLES. TO ME, THE MOST STRONGLY DRAWN FIGURE IN THE BOOK—AND IN THE STAGE PLAY—IS JAVERT, THE STERN, IMPLACABLE PURSUER OF JEAN VALJEAN. JAVERT’S PERCEPTION OF VALJEAN IS ALL APPEARANCE; INDEED, HE SO DEHUMANIZES HIS QUARRY THAT HE REFERS TO VALJEAN BY HIS PRISON NUMBER RATHER THAN HIS NAME. AS JAVERT RELENTLESSLY PURSUES VALJEAN ACROSS FRANCE AND DOWN THROUGH THE YEARS, HE IS A MAN OBSESSED BY THE APPEARANCE OF WRONGDOING.

AND YET, IN THE END, JAVERT COMES FACE TO FACE WITH REALITY. HE DISCOVERS THAT VALJEAN IS A BRAVE AND HONEST MAN WITH THE CAPACITY TO RISE ABOVE HIS PAST. WHEN VALJEAN SPARES HIS LIFE, JAVERT IS UNHINGED. HE CANNOT COMPREHEND A WORLD IN WHICH HIS APPEARANCE-BASED PERCEPTIONS OF HIS FOE ARE SO STRONGLY CONTRADICTED BY THE FACTS THAT WERE READILY APPARENT TO ALL EYES BUT HIS. AND SO, HE DESTROYS HIMSELF.

JAVERT IS SOMEWHERE BETWEEN A TRAGIC FIGURE AND A CARICATURE. BUT HIS SPIRIT LIVES ON, AS DOES HIS SINGULAR PREOCCUPATION WITH APPEARANCES.

THE INDEPENDENT COUNSEL: “THIS WOLF COMES AS A WOLF”

WITH THE FIGURE OF JAVERT IN MIND, FAST FORWARD WITH ME TO THE WONDERFUL WORLD OF THE INDEPENDENT COUNSEL.

NOW I KNOW THAT THE FEDERAL INDEPENDENT COUNSEL STATUTE EXPIRED OF ITS OWN WEIGHT. BUT THE IDEA REFUSES TO DIE, AS THE CURRENT TRIAL OF LEWIS LIBBY (I REFUSE TO REFER TO A GROWN MAN AS “SCOOTER”) AMPLY DEMONSTRATES. WHEN THE STORY OF THE LEAKING OF THE NAME OF A CIA OPERATIVE BROKE SEVERAL YEARS AGO, THEN-ATTORNEY GENERAL JOHN ASHCROFT DISQUALIFIED HIMSELF “OUT OF AN ABUNDANCE OF CAUTION” AND “TO AVOID EVEN THE APPEARANCE OF A CONFLICT OF INTEREST.” THE DEPUTY ATTORNEY GENERAL THEN APPOINTED PATRICK J. FITZGERALD AS “SPECIAL COUNSEL” TO HEAD THE INVESTIGATION. FITZGERALD PURSUED HIS

INVESTIGATION RELENTLESSLY AND ULTIMATELY A FEDERAL GRAND JURY INDICTED LIBBY, VICE-PRESIDENT CHANEY'S CHIEF OF STAFF.

LAST YEAR, LIBBY'S ATTORNEYS FILED PAPERS ASSERTING THAT FITZGERALD WAS IMPROPERLY APPOINTED BY THE JUSTICE DEPARTMENT RATHER THAN THE PRESIDENT. KEEP IN MIND THAT THIS IS BASICALLY A SEPARATION OF POWERS ARGUMENT. REMEMBER TOO THAT THE CODE OF FEDERAL REGULATIONS STATES THAT THE ATTORNEY GENERAL "MAY REQUEST AN EXPLANATION FOR AN INVESTIGATIVE OR PROSECUTORIAL STEP, AND MAY, AFTER REVIEW CONCLUDE THAT THE ACTION IS SO INAPPROPRIATE OR UNWARRANTED UNDER ESTABLISHED DEPARTMENTAL PRACTICES THAT IT SHOULD NOT BE PURSUED."

NOW, IN THE REAL WORLD, THIS MEANS THAT ONCE A SPECIAL COUNSEL IS APPOINTED, THAT PERSON CANNOT BE REMOVED FROM OFFICE NOR CAN THERE BE ANY REALISTIC CHALLENGE TO THAT PERSON'S PROSECUTORIAL DISCRETION. YOU WILL FORGIVE ME—ALTHOUGH OBVIOUSLY THE FEDERAL COURTS DID NOT SEE IT THIS WAY—IF I CANNOT DISCERN A MAJOR DIFFERENCE BETWEEN THIS APPROACH AND THE OLD, NOW-EXPIRED INDEPENDENT COUNSEL STATUTE.

WITHIN THIS CONTEXT, CONSIDER THE FOLLOWING OBSERVATION:

The mini-Executive that is the independent counsel, however, operating in an area where so little is law and so much is discretion, is intentionally cut off from the unifying influence of the Justice Department, and from the perspective that multiple responsibilities provide. What would normally be regarded as an investigation that has reached the level of pursuing such picayune matters that it should be concluded, may to him or her be an investigation that ought to go on for

another year. How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile—with whether it is worthwhile not depending upon what such judgments usually hinge on, competing responsibilities. And to have that counsel and staff decide, with no basis for comparison, whether what you have done is bad enough, willful enough, and provable enough, to warrant an indictment. How admirable the constitutional system that provides the means to avoid such a distortion. And how unfortunate the judicial decision that has permitted it.

DOES THIS SOUND LIKE A LESS GRAMMATICALLY CHALLENGED JAMES CARVILLE HAVING A BAD HAIR DAY OVER THE ACTIONS OF KENNETH STARR WHEN STARR WAS INVESTIGATING PRESIDENT CLINTON? SURPRISINGLY, IT ISN'T. RATHER IT IS JUSTICE ANTONIN SCALIA OF THE UNITED STATES SUPREME COURT, DISSENTING IN *MORRISON V OLSON*.

WAS JUSTICE SCALIA RIGHT? WAS THE INDEPENDENT COUNSEL STATUTE AN INSTITUTIONALLY BAD IDEA? I SUGGEST THAT HE WAS.

THE APPEARANCE STANDARD

AS AN ASIDE, LET ME NOTE THAT THE INDEPENDENT COUNSEL STATUTE WAS ONLY THE EGREGIOUS TIP OF A VERY, VERY LARGE ICEBERG.

ACCORDING TO SUZZANE GARMENT IN HER EXCELLENT BOOK SCANDAL: THE CULTURE OF MISTRUST IN AMERICAN POLITICS, FOLLOWING WATERGATE, THERE WAS A PROLIFERATION OF LAWS, RULES AND REGULATIONS, MANY OF THEM APPEARANCE-BASED, DESIGNED TO MAKE OUR POLITICS SQUEAKY CLEAN. OF COURSE, WE NEED A LEGION OF JAVERTS TO ENFORCE THESE MANDATES. NOT SURPRISINGLY, IN THE LAST THIRTY YEARS THE NUMBER OF ASSISTANT U.S. ATTORNEYS HAS

GROWN FROM APPROXIMATELY 650 TO APPROXIMATELY 3,000. ACCORDING TO GARMENT, IN 1970, BEFORE WATERGATE, THERE WERE 45 FEDERAL PROSECUTIONS OF FEDERAL, STATE AND LOCAL OFFICIALS FOR CORRUPTION. IN 1983, THERE WERE OVER 1,000 SUCH PROSECUTIONS, AN INCREASE OF *TWENTY* TIMES.

BUT, DOES ANYONE TODAY THINK THAT THESE PROSECUTIONS HAVE BEEN EFFECTIVE IN REDUCING REAL CORRUPTION? LISTEN THE COMMENTS OF DAVID GRANN IN THE NEW REPUBLIC:

The consequence is more than imperial prosecutors and endless scandal; it is the gradual erosion of decency and democracy. *Polls show that the majority of Americans believe Washington is more corrupt today than before the post-Watergate rules were passed. We have defined political deviancy down. By making everything a crime, we have, in effect, made nothing a crime; and we have certainly painted a picture of American politics that is guaranteed to produce a disaffected American citizenry.*

WORSE YET, APPEARANCE-BASED ETHICS HAVE METASTASIZED. AS NOTED BY MORGAN AND REYNOLDS IN THEIR BOOK THE APPEARANCE OF IMPROPRIETY:

[T]he process of “reform” has had as its chief result the creation of an “ethics establishment” that itself posses an active interest in keeping the flames of scandal burning even while soliciting funds to fight the fire. *The growth of this establishment has caused appearance ethics, and its accompanying vices, to metastasize well beyond the political field, infiltrating many other aspects of society, from science, to academia, to the business world.*

“THERE’S ALWAYS SOMETHING”

LET ME GIVE YOU ONE MORE LITERARY REFERENCE. IN MY OPINION, THE GREATEST NOVEL EVER WRITTEN ABOUT AMERICAN POLITICS IS ALL THE KING’S MEN BY ROBERT PENN WARREN. THE CENTRAL FIGURE IS WILLIE STARK, A THINLY DISGUISED HUEY P. LONG.

STARK'S CONSIGLIARE IS JAKE BURDEN, A FORMER NEWSPAPERMAN TURNED POLITICAL OPERATIVE. STARK IS BEING OPPOSED ON A FAVORITE PROJECT BY A LOCAL JUDGE AND HE ASSIGNS BURDEN TO DIG UP THE DIRT. BURDEN DUTIFULLY ROOTS AROUND (NOT KNOWING THAT THE JUDGE IS ACTUALLY HIS OWN FATHER . . . THE SOUTH IS FUNNY THAT WAY) AND REPORTS BACK THAT THERE IS NOTHING THERE. STARK LOOKS AT BURDEN IN AMUSEMENT AND THEN UTTERS—IN A BOOK WRITTEN OVER SIXTY YEARS AGO--WHAT COULD BE THE EPITAPH OF THE POST-WATERGATE ERA. "JAKE," HE SAYS, "THERE'S ALWAYS SOMETHING."

INDEED, THERE *IS* ALWAYS SOMETHING. WE NOW HAVE ON THE BOOKS THOUSANDS OF FEDERAL CRIMES, INCLUDING, ON ONE END OF THE RAINBOW, A STATUTE THAT MAKES IT ILLEGAL TO WRITE A CHECK FOR LESS THAN \$1.00 ON SUNDAY AND, ON THE OTHER END OF THAT SAME RAINBOW, MORE THAN 300,000 REGULATIONS THAT ARE CRIMINALLY ENFORCEABLE!

WHEN WE RECOGNIZE THAT THERE'S ALWAYS SOMETHING, CONSIDER HOW FRIGHTENING AN INDEPENDENT COUNSEL, FREE FROM NORMAL BUDGETARY CONCERNS, WITH NO TIME LIMITS ON HIS OR HER INVESTIGATION AND PRECIOUS FEW CONSTRAINTS ON THE PROSECUTORIAL DISCRETION THAT HE OR SHE CAN EXERCISE, ACTUALLY IS. ADD IN THE FACT THAT WHILE A NORMAL PROSECUTION STARTS WITH A CRIME AND ATTEMPTS TO ASSIGN GUILT TO A PARTICULAR PARTY, THE

INDEPENDENT COUNSEL PROCESS STARTS WITH A PARTY AND ATTEMPTS TO FIND A CRIME. THIS, I CONTEND, IS A PRESCRIPTION FOR DISASTER ... AND A SELF-INFLICTED DISASTER AT THAT.

FIRST PRINCIPLES

WHAT IS TO BE DONE? I SUGGEST THAT WE THINK ABOUT FIRST PRINCIPLES. WE NEED TO THINK ABOUT THE FACT THAT THE GOVERNMENT THE FRAMERS OF OUR CONSTITUTION ENVISIONED WAS ONE, AS JAMES MADISON PUT IT, IN WHICH THE GOVERNMENT'S POWERS WERE "FEW AND DEFINED." WE NEED TO THINK ABOUT THE FACT THAT IF OUR MODERN-DAY, UNACCOUNTABLE JAVERTS—WHETHER WE CALL THEM INDEPENDENT COUNSELS OR SPECIAL COUNSELS OR JUST OFFICIOUS BUSYBODIES—INVESTIGATE NOT ONLY IMPROPRIETY, NOT ONLY THE APPEARANCE OF IMPROPRIETY BUT, AS SENATOR JOE BIDEN SO FAMOUSLY PUT IT, "THE *POSSIBILITY* OF THE APPEARANCE OF IMPROPRIETY," THEN WE ARE ALL IN TROUBLE.

THE ROMANS HAD A SAYING QUOTED BY JUSTICE SCALIA IN *MORRISON: FIAT JUSTITIA, RUAT COELUM*: "LET JUSTICE BE DONE, THOUGH THE HEAVENS MAY FALL." APPEARANCE BASED JUSTICE IS NOT JUSTICE AT ALL. FROM WHERE I STAND, WE SHOULD ALL BE VERY GREATLY CONCERNED THAT ADHERING TO AN UNDEFINED, FREE-FLOATING APPEARANCE STANDARD, WE ARE WALKING DOWN A ROAD THAT MAY HAVE NO END. IN PARTICULAR, AND RETURNING TO MY CENTERPIECE EXAMPLE, BY LOOSING UNACCOUNTABLE PROSECUTORS

UPON OUR HIGH GOVERNMENT OFFICIALS, WE MAY BRING DOWN THE
HEAVENS AND THEN SEARCH IN VAIN AMIDST THE RUBBLE FOR A GOOD
REASON WHY.

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FEBRUARY 15, 2007