

**P Sc 104D, FALL 2012 / MIDTERM, Pt. II // Name:**

For this Question, you have been graded on four dimensions, earning between 0 and 3 points on each (0=Not attempted/Poor; 1=Unacceptable; 2=Acceptable; 3=Good))

**QUESTION C: TWO “BEST” ARGUMENTS (or EXAMPLES) to SUPPORT**

\_\_\_ **Professor 1** (Framers wise to give federal judges Life Tenure and avoid Popular Election; Judicial independence Very Imp't; Popular Elections are too much of a threat)

\_\_\_ **Professor 2** (Fed'l Process Not Immune from Electoral Politics; In Significant (although indirect) Ways, Voters & Their Reps Have Crucial Impact on Judicial Selection)

\_\_\_ **Professor 3** (Significant Electoral Political Pressures = Appropriate; Modern judges Have Major Impact on Important Public Policy & Too Much Reflect Ideological/Partisan agendas; Significant Electoral Accountability = Essential to Avoid Jud. Tyrants)

\_\_\_ **Professor 4** (Don't Overstate Judicial Impact. U.S. Supreme Court: As powerful as is, = Quite Limited in Impact on the policy issues and concerns of most Americans)

<b>ARGUMENT 1: Clarity/Specificity</b>	0	.5	1	1.5	2	2.5	3
<b>ARGUMENT 1: Accuracy/ Relevance</b>	0	.5	1	1.5	2	2.5	3
<b>ARGUMENT 2: Clarity/Specificity</b>	0	.5	1	1.5	2	2.5	3
<b>ARGUMENT 2: Accuracy/ Relevance</b>	0	.5	1	1.5	2	2.5	3

**= TOTAL POINTS FOR PART II, QUESTION C = [[ \_\_\_\_\_ ]]**

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<b>ARGUMENT 1: Clarity/Specificity</b>	0	.5	1	1.5	2	2.5	3
<b>ARGUMENT 1: Accuracy/ Relevance</b>	0	.5	1	1.5	2	2.5	3
<b>ARGUMENT 2: Clarity/Specificity</b>	0	.5	1	1.5	2	2.5	3
<b>ARGUMENT 2: Accuracy/ Relevance</b>	0	.5	1	1.5	2	2.5	3

**= TOTAL POINTS FOR PART II, QUESTION D = [[ \_\_\_\_\_ ]]**

**SUM OF QUES. C & QUES. D SCORES = << \_\_\_\_\_ >>**

## **SOME (of the Many) USEFUL WAYS to Answer Questions C & D**

### **PROFESSOR 1:**

#### Judicial Independence = Very Important:

\*\*State and federal judges are expected, once in office to act significantly independent of electoral majorities and political pressures; judges don't have "constituents" and are often called upon to protect the interests of unpopular minorities (e.g., criminal defendants; political extremists; marginalized people); justice is expected to be administered equally to all, blind of all the matters of privilege and bias that freely dominate the electoral/majoritarian process.

#### Popular Elections are Too Much of a Threat to Judicial Independence

All of these problems discussed in Carp, Chapter 5, could be used to argue that initial election of state judges in popular elections and/or use of popular elections to retain judges who are initially appointed by merit selection introduce politics in a way that threatens judicial independence:

--judicial elections becoming more like other elections in the 1980's: becoming more competitive and more expensive, requiring "preemptive fundraising and hiring of political consultants"

--the related growth of interest-group dominance, which raises the possibility that judges will be beholden to monied, powerful special interests that will blunt their independence (note: Carp specifically identifies a study by a "student of retention elections [who] notes that special interest groups have discovered that judicial retention elections 'are vehicles by which offending judges can be unseated and state judicial policy making can be influenced'"; again, this interferes with independent judgment)

--the special problem of lawyers with direct conflicts of interest in how judges rule being an increasing source of campaign financing

--the growth of televised advertising and a greater tendency of judicial candidates to take positions on policy issues (backed up by a 2002 Supreme Court ruling forbidding states from outlawing that); this means that elected judges will be expected to "deliver" on their "campaign promises" in the way other elected officials do, again undermining their capacity to judge issues independently and newly

This Carp chapter also provides good examples of politicized judicial elections, including:

--examples of growing election costs in Texas, Illinois, and Alabama (p. 105)

--one big donor's influence on the West Virginia Supreme Court, which ultimately the US Supreme Court found to be a violation of the US constitution (p. 106)

--Justice Penny White's unseating in a merit-selection retention election on an unfair smear campaign triggered by her unpopular rulings on the death penalty (p. 108)

### **PROFESSOR 2:**

#### Ways Electoral Politics Significantly but Indirectly Impacts Presidential Nomination of Federal Judges:

--Presidents/aides select federal judges reflecting the ideological views of their party and voting base

--During presidential campaigns, one salient (although not dominant) issue is what kind of justices/judges the candidate will appoint, whether the Court will overturn decisions like Roe v. Wade, etc. This significantly brings political/electoral influences indirectly into play, when the winner is expected to fulfill on campaign statements

--Federal judges often participated actively in electoral campaigns before assuming the bench (this is a useful aid to presidents trying to appoint like-minded judges both b/c it shows the policy leanings of the judge; electoral activity is also an important way judicial nominees come to the attention of the president and his aides)

--The "blue slip" process, which requires presidents to "check in" with and satisfy home-state Senators on district-court judge nominees makes Senatorial politics salient; Senators know that they must satisfy their constituents in the nominees they accept or oppose

--The unofficial norm by which presidents filling a vacancy on the federal appellate bench which will mean only one judge is from a particular state need to satisfy home-state Senators similarly brings certain Senatorial political/electoral dynamics into play

--The increasing role of interest groups in trying to influence selection of nominees (either by promoting some candidates or by opposing others – see Republican interest groups opposing Alberto Gonzales, a supposed front runner to be a Geo. W. Bush nominee for the Supreme Court) also indirectly brings in "electoral politics"; those interest groups represent the same political and policy pressures that are brought to elections

#### Ways Electoral Politics Significantly but Indirectly Impacts Senatorial Confirmation:

--Growing Interest group participation in Senate Judiciary Committee hearings and in endorsing and opposing nominees during later full-Senate voting brings electoral pressures in indirectly

--Senators on the Judiciary Committee or not know that the voting public will care about their confirmation votes; so electoral politics definitely figures significantly in their decisions about whether to support or oppose a nominee

--During senatorial campaigns, one salient (although not dominant) issue is what kind of justices/judges the candidate will support, whether the Court will overturn decisions like *Roe v. Wade*, etc. This significantly brings political/electoral influences indirectly into play, when the winner is expected to fulfill on campaign statements

--As Baum points out, the most recent Supreme Court nominees have been confirmed by narrower margins that tend to split along party lines.

[NOTE: Any item in the previous section relating to Senators (e.g., the blue slip process) could instead be presented as a way in which electoral politics affects Senators – although the same item should not be used as TWO different examples]

### **PROFESSOR 3:**

#### *Modern judges Have Major Impact on Important Public Policy:*

[Here, the answer could mention any ways in which judges affect policy, such as:

--criminal defense rights (e.g., death penalty, limits on sentencing enhancements on facts not found by juries; self-incrimination rights; search and seizure)

--criminal- and civil-trial procedures (e.g., limits on admissibility of witness and lay testimony; limits on race- and gender-based peremptory challenges to jurors)

--important social issues (e.g., abortion; right to die; etc.)]

#### *Modern judges reflect Ideological/Partisan agendas Too Much:*

--Looking at the modern Supreme Court, for example, one finds major vote splits on liberal/conservative lines depending upon

\*varying justices in a given time (see Baum, Table 4-2, p. 124, variations from most-liberal Stevens (70%) to Thomas (28%))

\*variations in liberal civil-liberties by Courts over time (see Baum, Table 4-3, p. 128)

--The same pattern also applies to federal district-court judges (see, e.g., Figure 7-1, p.165 & Table 7-1, p. 173, showing significant differences in “liberal” rulings (varying based on the issue), varying with the partisanship of the appointing president)

#### *Significant Electoral Accountability = Essential to Avoid “Judicial Tyranny”*

--Given major judicial policy impact and ample room for ideology/partisanship, it makes sense that electoral politics (which in our majoritarian democracy is presumed to legitimate major policy changes and which directly reflects ideological and partisan differences should be brought to bear)

--Without electoral accountability, judges and justices will be able to act like policy makers without being subject to the same constraints that elected policymakers are; they truly do become “judicial tyrants”

### **PROFESSOR 4:**

#### *Supreme Court Has “Quite Limited Impact” on Policy Concerns and Interests of Most Americans:*

--The Supreme Court is a “policy specialist” with admittedly substantial impact on some controversial legal issues of concern (e.g., abortion and reproductive freedom; discrimination and affirmative action; privacy), but little impact on

\*Budget priority setting and taxation (only at the margins can the Court limit or channel powers fundamentally exercised by Congress and the president)

\*Taxation is the same (only rarely does Court deal with taxation; generally defers to political judgment of Congress and the president; see Obamacare decision, upholding individual mandate as an exercise of taxing power)

\*Foreign policy (war, military policy, diplomacy with foreign countries, etc.) is even less subject to Court guidance; in addition to the even greater deference given to elected officials, especially the president, the doctrines of judicial restraint referred to below work against the Court weighing in on these issues

--The Court has a lessened impact on policy b/c it must await policy questions coming to it in the form of appeals filed in lower-court lawsuits; unlike elected officials, the Court cannot as actively set its agenda

--The Court’s inability to enforce its own orders (and therefore its dependence on other political branches to enforce its rulings) gives it a reduced ability to impact even the policy areas where it does focus (e.g., school desegregation under equal protection required Pres. and Congress to enforce)

--The doctrines of judicial restraint (“justiciability”) discussed in both Carp and Baum cause the Court to avoid deciding some of the broadest and most controversial exercises of policy discretion (e.g., decisions

where all Americans share a common concern in good government and no plaintiff has special injuries necessary for "standing"; cases in which the issue is a "political question" to be decided by elected officials)