

To retrace our steps briefly, Ponnuru wrote his article, I wrote a post on SCOTUSblog linking Ponnuru's article to what I perceive – although thoughtful people disagree – as a setup to undermine Tribe's credibility in advance of a confirmation fight.

Ponnuru wrote a post on The Corner accusing me of, inter alia, avoiding the question of the scholarly misconduct of which Ponnuru had accused Tribe. I hadn't undertaken to look into the substance of Ponnuru's allegations in my first post – assuming, because it was in a reputable publication that addresses serious issues, that it was correct. But prodded by Ponnuru's response, I decided that it was worth checking out the substance of his claims.

So last night I produced an 8-page-ish single-spaced look into what Ponnuru claimed. If you're reading this post, you've almost certainly read that piece, so it's not necessary to rehearse the whole thing. But it's worth repeating my personal conclusions.

It seemed clear to me that Ponnuru was “quite wrong” across the board. I addressed each claim by Ponnuru regarding Tribe's representations of what he did in *Richmond Newspapers*. Taking them in turn, I concluded that he had omitted Tribe's actual statement of the Ninth Amendment argument he had made, thereby creating a misimpression about it; that he had misrepresented Tribe as having claimed to have been “a forgotten hero of the Ninth Amendment”; that he had misstated Tribe as having claimed that his father's death had inspired him to invoke the Ninth Amendment in *Richmond Newspapers*; that this misstatement had the consequence of misleading readers into believing that Tribe claimed to make an argument in the reply brief and at oral argument; that he had very seriously misrepresented Tribe's opening brief in *Richmond Newspapers*, which made precisely the argument that Tribe claimed; that he had squarely misquoted the oral argument; and that he had misrepresented how the oral argument in *Richmond Newspapers* had been conducted. As harsh as those conclusions all sounds, I did my level best to avoid rhetoric that would obscure the substance and cloud the ability of readers to decide for themselves.

I concluded by saying that, as noted above, I appreciated the views of people who disagreed with my impression that Ponnuru's piece was tied to the looming confirmation fight, and that I could accept that. I said that I believed that Ponnuru's piece deserved to be considered on its merits or demerits – as did my response – with name-calling put to the side. After all, the point of my original post was about the unhealthy level of rhetoric. Nonetheless, I said that if a reader came to the objective conclusion that Ponnuru's piece was inaccurate, he or she should be quite troubled because it was an assault on an individual's personal integrity, which if unjustified is (to my mind) normatively wrong.

My point in repeating the above isn't to make you suffer through it again, but to set up Ponnuru's response. I doubt – although I don't know because I've never heard of Ponnuru, just as I assume he's never heard of me – that Ponnuru has never had a piece of his work subjected to such thoroughgoing criticism, with claims of substantial inaccuracies at every turn. (If he has, that kind of makes it worse, I suppose.) I doubt that an objective person believes – in fact, believes for a second – that if Ponnuru thought I was wrong, he would leave the substance of my analysis un rebutted. Before my posts, his piece got very little attention outside the quite-conservative blogosphere of readers who were likely predisposed to distrust and have disdain for Tribe to

begin with. Now our exchange has been the subject of posts on the Volokh Conspiracy and How Appealing, and the substance of his piece is genuinely under the microscope for persuadable people – *i.e.*, not those who are quite liberal and already overwhelming predisposed to believe that Ponnuru was engaging in a hack job, and not those that are quite conservative and already overwhelmingly predisposed that Ponnuru was exactly right – willing to take seriously his argument.

So, here is what Ponnuru has to say on The Corner. In a post entitled “Can Tom Goldstein Read?”, he writes that I’m not merely “slippery and dishonest,” but “also rock dumb.” It seems that he only “read a third of [my] endless commentary and skimmed the rest,” enough to convince him that “there’s no point in reading the whole thing thoroughly to see if he’s made any valid criticisms of me.” But he has “two easy-to-explain examples of the quality of thinking (and reading) we’re dealing with here.”

First, he continues to object to my characterization of his piece as an attempt to undermine Tribe in a pre-confirmation fight. I personally disagree, but as I mentioned above, I said in my analysis that I was willing to accept that.

Second, he writes:

At one point in my article, I compared Tribe's brief to the Court with other briefs, noting that those other briefs made much more extensive Ninth Amendment arguments than Tribe did. I therefore noted some of the points those other briefs mentioned and Tribe's did not.

For Goldstein, this portion of my article "just represents Ponnuru's view that he knows better than Tribe how to argue a constitutional law case in the Supreme Court."

He continues, advising that “Goldstein should read this next passage slowly” (I’m trying!):

Obviously I'm not saying that Tribe made a mistake in how he argued his case before the Supreme Court. He told me, in a comment I quote in the article, that he had figured out a way to argue the case before the Supreme Court without invoking the Ninth Amendment. That, he said, was the wisest thing to do given the prevailing view of the Ninth Amendment. I'm not at all second-guessing that judgment. Listening to the counsels of prudence may have been the right thing to do! But having done that, don't go around saying how you bravely ignored those counsels. The problem isn't with how Tribe argued the case, but with how he later misrepresented what he had done.

Again, Ponnuru’s being initially inaccurate and then just assuming a conclusion that he won’t defend. The inaccuracy is that I never said that Ponnuru was claiming to be a better lawyer because he quoted other lawyers’ briefs. Here’s what I actually wrote (emphasis mine):

Second, Ponnuru contends that Tribe only made passing references to the Ninth Amendment in the opening brief. He contends:

Tribe's brief on the merits of the case did refer to the Ninth Amendment – but the references hardly justify the billing Tribe gave them two decades later. Tribe opened and closed a seven-page section of his 72-page brief with references to the amendment. But in between he mostly discussed Fourteenth Amendment precedents. There was no discussion of the history of the Ninth Amendment – nothing about how James Madison viewed it, nothing about the Court's prior treatment of it. The previous case in which the Ninth Amendment had figured most prominently was *Griswold v. Connecticut* (1965), in which the Court had struck down a law against contraception. Tribe didn't mention it. The Ninth Amendment was a mere rhetorical flourish in this brief. The State of Virginia felt no need to include any Ninth Amendment analysis in its own brief, since there was nothing much to respond to.

The first part of this paragraph is just misleading. *The second part of it* just represents Ponnuru's view that he knows better than Tribe how to argue a constitutional law case in the Supreme Court. If you believe that, then by nature you're going to believe inconsoably that Ponnuru is right about all of this and Tribe is wrong. (Tribe did win the case, incidentally.)

So, Ponnuru's article claimed that Tribe didn't make the Ninth Amendment argument, as illustrated (Ponnuru says) by the fact that he didn't cite the history of the Ninth Amendment or *Griswold* (incidentally, maybe because of the criticism surrounding that decision at the time). I said that could only amount to Ponnuru's view that he is a better lawyer because, objectively, Tribe did make a lengthy Ninth Amendment argument in his opening. I proceeded to illustrate that fact at some length in my analysis, and Ponnuru now doesn't defend his contrary claim – which lies at the heart of his article.

The assumed conclusion that Ponnuru won't defend is his statement that Tribe "later misrepresented what he had done." That's what I spend several single-spaced pages refuting in my analysis. But Ponnuru repeats the same conclusion that isn't supported by the facts.

Ponnuru's only remaining claim in his rebuttal is that "Goldstein's zeal leads him to make arguments for Tribe that Tribe has already cut off!" (Which arguments [plural] we don't know; Ponnuru tries to offer one.) "Goldstein advances a cockamamie argument that Tribe was trying to talk about the Ninth Amendment at the Supreme Court but was cut off. But this means we now have three different stories. Tribe's 2003 article reaches its focal point with what he 'dared to say' at the Supreme Court (not what he had daringly *tried* to say but wasn't quite able to say). In a 2005 interview with me, Tribe said he had figured out how to make the argument without invoking the Ninth Amendment. And then there's Goldstein's theory."

This is, again, inaccurate. Here is what I wrote (incidentally, it appears at pages 5-6 of my analysis; the "third" of the piece Ponnuru read must have been the middle third):

Relatedly, Ponnuru states that Tribe didn't raise the Ninth Amendment when asked at oral argument:

Fifteen minutes into it, a justice asked Tribe “just what provision of the Constitution [the Virginia statute] violates as applied in this case.” Tribe replied, “I think that it violates the Sixth Amendment, and the First, and the Fourteenth.”

That is simply a flat misquotation. The audio is available at this link: <http://www.oyez.com/oyez/resource/case/328/resources>. In fact, Tribe doesn't end the sentence with “the Fourteenth.” He says, “I think that it violates the Sixth Amendment, and the First, and the Fourteenth, *and I*” (emphasis mine) and then the Justice *cuts him off* and asks another series of questions. This is a troubling misrepresentation because Ponnuru apparently is listening to the same on-line audio I am, so he knows that Tribe gets cut off but tells the reader through the punctuation the contrary. (Ponnuru says twice that he's using “[a]n audio transcript” but that seemingly can't be right because he later refers to the particular Justice asking the questions.) I can't say for sure that Tribe was going to say “and I think the Ninth,” but the constitutional provisions discussed by Tribe's brief were the First, Sixth, Fourteenth, and Ninth Amendments, so it seems entirely possible. In all events, Ponnuru's readers take away the mistaken impression that Tribe laid out his theories and consciously omitted this one.

So, my claim is that Ponnuru misquoted and thus misrepresented the argument, because Tribe was cut off. Ponnuru doesn't dispute that. Instead, he says that “Tribe's 2003 article reaches its focal point with what he ‘dared to say’ at the Supreme Court (not what he had daringly *tried* to say but wasn't quite able to say).”

I don't know what Ponnuru means by “reached its focal point,” but if Ponnuru is trying to say something responsive he must be suggesting that Tribe represented that he made the Ninth Amendment point at oral argument. But here is what Tribe actually says in the quote Ponnuru uses:

Yet, as I reflected on it, I began to wonder whether the private story – the story that repeats itself silently whenever the public script turns to *Richmond Newspapers* – might in some way have affected what I had dared to say on that February day, or how I had argued this point or that. Maybe it did, in some remote way, even affect what the Court wrote in the case. None of us is in full command of precisely which private facts might have left their trace on the public world. But my main reason for deciding to tell the story here was just that it's too large a part of who I am for me to leave it permanently submerged.

Tribe is just saying that his father's death might have affected the oral argument or how he argued things generally. This quote has nothing to do with the Ninth Amendment. And Ponnuru is misleading his readers here in just the same way my original analysis pointed out. As I say there, and Ponnuru doesn't dispute, “Ponnuru's readers would never know that Tribe's essay had a lengthy – *more than two page* – section discussing the oral argument itself in substantial detail in which Tribe never *once* said that he had raised the Ninth Amendment at oral argument. If Tribe were actually contending that he discussed the Ninth Amendment at oral argument, he would have said so in that section.”

Ponnuru's remaining point is that he says the following in his piece: "Tribe called back a few hours later. He remembered something. 'By the time of the oral argument, I had figured out a way . . . to argue the case orally without invoking the Ninth Amendment, which I knew some people were allergic to.'" I don't know what Ponnuru's ellipses omit, and I'm no longer willing to give him the benefit of the doubt that a piece in the National Review ought to be entitled. It seems to me likely that Tribe meant by "without invoking" not that the words wouldn't touch his lips – to do that would require abandoning the claim if the question were put to him – but that he wouldn't rely on the Ninth at any length. But assume I'm wrong, and assume that Tribe did make a pre-argument decision not to mention the Ninth Amendment. The relevant point is that – as I explained at length – Tribe never claimed to the contrary in his *Green Bag* piece.

Now return to my original point. I spent eight pages detailing at length how Ponnuru's claims across the board are inaccurate. What is the best Ponnuru can do to defend the substance of his story against the most serious doubts that have been raised against it: not to respond to a single one of the very substantial claims that his assertions were inaccurate? What he has is rhetoric – no doubt, it's red meat to true believers that were convinced before he wrote a thing, but what about the people to whom he intended to prove that Tribe engaged in "scholarly misconduct"?

My remaining request is that people take the time to judge for themselves and to write about their conclusions – including if they believe I'm flat-out wrong; not merely slippery and dishonest but rock dumb too. This was an extremely high-profile attack by Ponnuru – including in the print edition of the National Review – on the personal integrity of an individual. For academics, the allegation of scholarly misconduct should to my mind raise serious concerns. If it's correct, so be it. But if it's not correct, then others ought to say so.