



# FEDERALLY SPEAKING



by Barry J. Lipson

## Number 49

Welcome to *Federally Speaking*, an editorial column for **ALL** interested in the **Federal Scene**, originally compiled for the members of the Western Pennsylvania Chapter of the Federal Bar Association and all FBA members. Its purpose is to keep you abreast of what is happening in the Federal arena, whether it be a landmark US Supreme Court decision, a new Federal regulation or enforcement action, a “heads up” to Federal CLE opportunities, or other Federal legal and related occurrences of note. Its threefold objective is to educate, to provoke thought, and to entertain. This is the 49th column in this series, and together with prior columns is available on the website of the U.S. District Court for the Western District of Pennsylvania: <http://www.pawd.uscourts.gov/Pages/federallyspeaking.htm>.

### LIBERTY’S CORNER

#### THE CONTINUED VIABILITY OF JUDICIAL INDEPENDENCE

Alexander Hamilton is credited with stating the rationale for an Independent Judiciary, to wit, “*a steady, upright, and impartial administration of the laws is essential, because no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be the gainer today.*” Interestingly, this is the same rationale given by the American Civil Liberties Union (ACLU) for standing ready to defend all persons whose Constitutional Rights are violated, rich, poor; black, white; liberal, conservative; Christian, Muslim; Civil Rights Advocate, Neo-Nazi, pro-life, pro-choice; militant, draft dodger; victim, criminal; etc, etc.

In light of recent attempts to castrate so-called judicial legislators and activists; to nominate and confirm jurists who will decide cases based on issues not merits; to tie the hands of judges in evaluating and formulating sentences; etc., this column will examine the current state of Judicial Independence.

#### The Swinging Pendulum and the Independent Judiciary

In past writings, over the last decades, your columnist has likened the modern forces of social change to a swinging pendulum, perpetually sweeping back and forth, back and forth, back and forth, but always returning to the center; a center, however, that slowly and sometimes gratingly, sometimes grandly, but surely and inexorably, *is ever inching leftwards*. The recent return of control of the **Second Branch** of the U.S. Government, the House and Senate, to somewhat moderated left-leaning Democratic control, from over a decade of farther right-leaning Republican control, together with real or feigned gestures of reconciliation (such as the immediate acceptance of the Secretary of Defense’s resignation) by the **First Branch**, certainly appears to be a case in point.

And key to the proper functioning of this laudable social mechanism is an independent **Third Branch**, an Independent Judiciary, which is why the U.S. Constitution deliberately establishes checks and balances, a balancing of powers, between these three branches of government, which in itself is one of the leftward movements of the center embodied in this enduring landmark document.

Former U.S. Senator Warren B. Rudman (R-NH, 1980-92), is one Republican who recognizes both the importance of an Independent Judiciary and the role of the U.S. Supreme Court in the proper functioning of this social mechanism: “I think there’s only one thing you really have to look at to understand why we must have judicial supremacy in the United States Supreme Court. And I would submit to you that if you didn’t have it, you would have going on in the country what now goes on in the Congress, with years and years, decades of conflict, with no solution in sight, destabilizing the body politic in American society. The case I think of, of course . . . is Brown [*Brown v. Board of Education*, 347 U.S. 483 (1954); School Desegregation]. For decades, there was a cancer on this country that neither the Executive Branch nor either political party had the wherewithal or the guts or the intellect to deal with. And it was dealt with by the United States Supreme Court. And it was accepted by everyone, although reluctantly, as the law of the land. . . . [I]n my humble opinion, there must be a final arbiter in this country and I think that final arbiter has to be the federal Judiciary in the personification of the Supreme Court.”

### **Common Law Judges as Judicial Activists**

Central to this role of the Courts in performing their key duty as a Constitutional check and balance on the other two branches, and in enabling the proper operation of this social mechanism as embodied in the U.S. Constitution, *is the Common Law*, which is the system of law that governs in all Courts of the United States except Louisiana. Under the Common Law *all Judges are activists* and create or “legislate” law, for the “distinctive feature of common law is that it represents the law of the courts as expressed in judicial decisions. The grounds for deciding cases are found in precedents provided by past decisions . . . Originally, supremacy of the law meant that not even the king was above the law; today it means that acts of governmental agencies are subject to scrutiny in ordinary legal proceedings” (*Columbia Encyclopedia*). “Under the common-law system, when a court decides and reports its decision concerning a particular case, the case becomes part of the body of law and can be used in later cases involving similar matters. This use of precedents is known as *stare decisis* [“stand by the decided matter”]” (*Encyclopedia Britannica*), and “the previous decisions of the highest court in the jurisdiction are binding on all other courts in the jurisdiction. Changing conditions, however, soon make most decisions inapplicable except as a basis for analogy, and a court must therefore often look to the judicial experience of the rest of the English-speaking world. This gives the system flexibility, while general acceptance of certain authoritative materials provides a degree of stability” (*Columbia Encyclopedia*).

Then too, “in statutory interpretation the courts have recourse to the doctrines of common law” (*Ibid.*). Thus, as the human intellect is limited and in drafting legislation can not encompass all eventualities, intentionally or unintentionally broad concepts, ambiguities, gaps and/or misstatements can appear in and/or creep into all humanly drafted documents. For example, in Section 1 of the Sherman Antitrust Act: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” Pretty clear and straight forward, *right*? No, *left-out* of the purview of the draftsman’s understanding here was that, to some extent or other, *every commercial contract restrains trade*. Was this legislation then, which apparently contained the clear intent of the **Second Branch**, as signed into law by the **First Branch**, to

be peremptorily discarded by the **Third Branch**? Or worse yet, to be permitted by the **Third Branch** to grind business to an absolute standstill? Neither, instead the Third Branch read the word “*unreasonably*” into the statute, making “every contract ... *unreasonably* in restraint of trade ... illegal,” and then thereafter used “recourse to the doctrines of common law” to determine which contracts were “*unreasonably* in restraint of trade.” Judicial legislation, yes! Judicial activism, yes! A proper action under our Constitutional Common Law Jurisprudence, most definitely!

But what if the Supremes had just said “Congress you goofed, it won’t work, so we won’t enforce it,” and had done nothing to make it right? In my view, Congress would have been taken aback, but would have simply done what it had already done *in this and in so many other enactments*, declare broad principles, in this instance reworded, while still leaving it up to the Courts to utilize “recourse to the doctrines of common law” to flesh out the practical ambit of the legislation (which Congress thought it had done in the Sherman Act in the first place). That is, it would have itself added a word like “unreasonably,” and sent it back to the Courts for embellishment.

## **The Supreme Court and Judicial Independence**

As reported in *Federally Speaking*, Numbers 47 & 44, former Republican-appointed U.S. Supreme Court Justice Sandra Day O’Connor, at Georgetown University on March 10, 2006, “cautioned against current trends that ‘challenge the independence of judges and the freedoms of all Americans’ which could lead to a dictatorship here in the good ‘ole U.S. of A. ... [S]he stressed that the ‘nation’s founders wrote repeatedly ... that *without an independent judiciary to protect individual rights from the other branches of government those rights and privileges would amount to nothing*.... Pointing to the experiences of developing countries and former communist countries where interference with an independent judiciary has allowed dictatorship to flourish, O’Connor said *we must be ever-vigilant against those who would strong-arm the judiciary into adopting their preferred policies*. It takes a lot of degeneration before a country falls into *dictatorship*, she said, but we should avoid these ends by avoiding these beginnings.” (Emphasis added.)

Her caution followed upon “the New Year’s Day 2004 lead of then sitting Conservative Republican U.S. Supreme Court Chief Justice William Rehnquist who ‘bawled out Congress for enacting Sentencing Guidelines which impinged on judicial independence’ and could ‘intimidate individual judges’” (*Federally Speaking*, Numbers 47, 44 & 36). Of Chief Justice Rehnquist, Democratic U.S. Representative Nancy Pelosi, presumptive Speaker of the House come January 2007, said upon his death: “As Chief Justice, he was a strong advocate for an independent judiciary, particularly in response to recent threats to impeach judges for their judicial decisions and to strip federal courts of jurisdiction.”

At about the same time, on September 9, 2005, Representative Pelosi wrote about Judicial Independence: “The stakes in preserving an independent judiciary are profound. For more than two centuries, an independent judiciary has served as guardian of our Constitution, our individual rights, and the rule of law. It is a model for the world, and a model we cannot allow to be dismantled here at home.” Concerns about what the replacing of pro-Judicial Independence Chief Justice Rehnquist and Justice O’Connor, with Conservative-sponsored Chief Justice Roberts and Justice Alito, especially in light of the passage of apparently Civil Liberties-limiting legislation shortly before the recent Congressional elections, will have on Judicial Independence, have been widespread. It has been feared that these replacements will make the Supreme Court less willing to fulfill its role, as discussed above,

of restoring our stolen liberties, and in the words of former Republican Senator Rudman, of excising “cancer” from the body politic.

### **The Great Middlizer At Work**

As to Justice Alito, we must rely on the “*Great Middlizer*,” the *great equalizer* of modern times, “that seemingly irresistible force that tends to mitigate extremes in the Presidency and the Judiciary, whether they be Democrat or Republican controlled, and propels those occupying such positions towards the *middle of the road*” (*Federally Speaking*, No. 47), as it seems to be doing with regard to President Bush “43,” as a result of the 2006 Republican defeats. Political pressures seem, at least in part, to cause this in the Presidency. But why does this occur in the Federal Judiciary? It has been speculated that ‘lifetime tenure with no retirement age means total independence from effective pressure of any kind. The ‘reward system’ on the Court is very different from the system prevailing in a nomination battle. During the nomination phase, strict adherence to the ideology of your side—at least in appearances—is essential. Once the black robes are donned, the approval of society’s elites, including editorial and academic praise, is highly prized by most Justices” (*Federally Speaking*, Number 45.).

But “middlization” with regard to Chief Justice John G. Roberts, Jr. may be considerably further along. During his Judiciary Hearings, Chief Justice Roberts had stated: “An independent judiciary is one of the keys to safeguarding the rule of law.” And at Middlebury College on October 24, 2006, before the Republican defeats, after learning how admired America’s Independent Judiciary is by foreign jurists, the Chief Justice expounded: “One thing we stand for is the rule of law implemented by an independent judiciary. ... People often ask me, ‘what is it about being Chief Justice that has surprised you the most?’ The answer for me, anyway, is the number of judicial visitors we get at the Supreme Court from around the world that come ... to try to learn how to establish independent judiciary — something we take for granted.” Earlier, on September 28-29, 2006, at the Georgetown Law School’s *Fair and Independent Courts Conference*, Justice Roberts had observed that: “Just about every week at the court, we have a delegation of judges or justices from an emerging democracy around the world, judges who, in many cases, the threat to judicial independence is often a threat to their physical safety, certainly to their well-being. And yet, they are striving to establish an independent Judiciary that can defend the rule of law in their country. They come to our country, and they come to the Supreme Court because they draw inspiration from the role and stature of the **Third Branch** in our democracy.”

At this Conference the Chief Justice also had specific advice for Conservatives: “There is a final responsibility that comes with judicial independence, one that I think President Reagan captured perfectly 25 years ago ... At a reception for judges in the White House, President Reagan said that the *Judiciary’s ‘commitment to the preservation of our rights often requires the lonely courage of a patriot.’* Those words have stuck with me since I heard them. And to the extent that attacks on judicial independence emanate from conservative quarters, I would commend to those quarters those words from the leading conservative voice of our time, ‘the lonely courage of a patriot.’ President Reagan recognized that *it was the job of judges to make unpopular decisions*; unpopular with the populace at large, unpopular with particular social or professional elites. But he also recognized that the courage required of them *was the courage of a patriot because in making those unpopular decisions, they were fulfilling the framers’ vision of a society governed by the rule of law.*” Emphasis added.

Thus, having “donned” the Nation’s Supreme “black robes,” is the Chief Justice not now seeking to exhibit the “lonely courage of a patriot” by “fulfilling the framers’ vision of a society governed by the rule of law;” while, at the same time, obtaining the “highly prized ... approval” of the World “society’s elites” by honoring our Independent Judiciary traditions, traditions he had previously taken for granted?

## **The Future of Judicial Independence**

According to the ACLU we have just gone through “five long years of profound abuses of power by the White House and Congress' failure to hold the president accountable.” Without passing judgment in this column, the areas the ACLU believes need to be rectified under the U.S. Constitution by a truly Independent Judiciary that is ready to fulfill “the framers’ vision of a society governed by the rule of law,” if the new Democratic-controlled Congress, with or without the cooperation of the White House, fails to do so, include:

\* "NSA's warrantless eavesdropping ... build on our ACLU v. NSA courtroom victory by continuing to challenge this program in court and in Congress".

\* "Military Commissions Act ... restoration of due process and the *writ of habeas corpus*, a cornerstone of our Constitution and our legal heritage".

\* "FBI monitoring of peace activists and religious organizations ... end unfettered government access to our private financial, health care, and communications records".

\* "End government ... funneling of billions of tax dollars to religious institutions that are free to discriminate ... assault on reproductive freedom ... [and] marriage equality".

Now that the White House is no longer in effective control of Congress, and the Democratic legislators are no longer leery of electorate backlash for opposing the White House, new anti-civil liberties initiative should bear little fruit, and the continued nomination of hand-picked Conservative issue-oriented jurists for the Federal District, Circuit and Supreme Court Benches, should have little success.

However, the reversal of the anti-civil liberties initiatives enacted and/or implemented during the past five years, including the Military Commissions Act’s unconstitutional incursions into the Constitutionally protected area of *Habeas Corpus* (US Const, Art. I, §9, cl. 2; *Rasul v. Bush*, 542 U.S. 466 (2004); *Federally Speaking*, No. 48), may well need the intervention of a truly Independent Judiciary that is ready and willing to fulfill “the framers’ vision of a society governed by the rule of law.” Hopefully, the White House’s pre-election 2005-06 attempts to place Justices on the U.S Supreme Court who would decide cases based on issues not merits, will also not bear fruit.

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**This Column is dedicated to the preservation of the U.S. Constitution & the Bill of Rights.**

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