ATTORNEY GENERAL MEESE

vs.

CHIEF JUSTICE JOHN MARSHALL

BY

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Attorney General Edwin Meese III has sharply criticized the federal judiciary, particularly the Supreme Court, for departing from the "original intent" of the Founding Fathers.

Further, the Attorney General questions whether the so-called "doctrine of incorporation" (which through the 14th Amendment, applies the Bill of Rights to the states) is really in accord with the framers' wishes.

Justices Brennan and Stevens have publicly taken sharp exception to these views expressed by Mr. Meese, terming them unfounded, simplistic and anachronistic.

The Media understandably has enjoyed a field day with this contretemps. The protagonists might have debated in Government briefs or Court opinions. Indeed, it has been so argued in many cases. Going public, however, considering the principals, is rather unprecedented but, as Chief Justice Burger acknowledged, at the American Bar Association's annual meeting in London last summer, the Court, like all our institutions, is not immune from criticism. Constitutional debate has historical origins and criticism of the judiciary isn't necessarily harmful and, indeed, may be both warranted and helpful. I doubt,however, that the Chief Justice envisioned a public controversy between sitting Justices and our nation's chief law enforcement officer.

In analyzing the merits of this debate, one must confess to a sense of deja vu. The subject is hardly novel, rather it has comparatively ancient roots.

With respect to the contention of the Attorney General, that the Supreme Court should adhere to the "original intent" of the Founding Fathers and is over-stepping its bounds in not doing so, Mr. Meese confronts a most formidable adversary.

The Attorney General runs afoul, in judicial constitutional interpretation, of the greatest of all Chief Justices of the Supreme Court of the United States, John Marshall, who himself was an eminent Founding Father.

The core of the constitutional philosophy of Chief Justice Marshall was expressed in McCulloch v. Maryland, decided in 1819. In a oft-repeated phrase, he said "... It is the Constitution we are expounding ... intended to endure for ages to come and consequently, to be adapted to the various crices of human affairs." Marshall added that to attempt to prescribe in detail in the Constitution the answers to unforseen contingencies" would have been to change, entirely, the character of the instrument and "give it the properties of a legal code." This he observed would be most "unwise."

Chief Justice Marshall's constitutional philosophy has been described as the evolutionary concept of the nature of our Constitution. This philosophy has been pervasive throughout our legal history and has been accepted, with few exceptions, by the federal judiciary, present and past scholars, legal and lay.

A few pertinent quotations are illustrative ; Chief Justice Harlan F. Stone, appointed to the Court by President Coolidge, in United States v. Classic (1941) said:

> "In determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government."

And Justice Joseph McKenna, appointed by President McKinley, expressed the same view in Weems v. United States, decided in 1910:

> "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach imortality as nearly as human institutions can approach it.' The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality."

The simple fact is that the Founding Fathers, endowed with an unparalleled genius for stagecraft, wrote our fundamental law in 6,000 words, general in nature and replete with ambiquities, requiring judicial interpretation.

This the framers did to endow this greatest of political documents with an innate capacity for growth and adaptation to enable the Constitution to meet new needs and unforseen contingencies.

The Constitution, as Justice McKenna and many other judges have pointed out, was, in Marshall's words, "designed to approach immortality as nearly as human institutions can approach it."

The grand design of the Constitution, is frustrated by reading it literally as a code or statute.

The Constitution is a state document of inspiration. It is our legend and hope, the union of our minds and spirit. . It is our defense and our protector, our teacher and our lode star in the quest for liberty and equality.

In a profound sense, simplistic invocation of the Founding Father's intention does injustice to their vision and grand design in framing our fundamental law.

On the "original intent" issue, it would appear that Mr. Meese, with all respect, is on a bad wicket.

The Attorney General's other criticism of the Court's constitutional philosophy, the so-called "incorporation" doctrine is equally untenable.

All present members of the Burger Court, as did the Warren Court, agree that the Fourteenth Amendment makes the fundamental guarantees of the Bill of Rights (originally designed to protect only against abridgement by Congress) obligatory on the States.

This derives from the plain language of the Amendment, which reflects the intention of its framers: "...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

Surely, the basic safeguards of the Bill of Rights are fundamental liberties of Americans. Denial of any of them by states is plainly a denial of due process of law prohibited by the Fourteenth Amendment.

The Attorney General is also on a bad wicket in arguing to the contrary.

Attorney General Meese, however, is not engaging in an abstract philosophical constitutional debate. He is insisting that it is time to rein in libertarian interpretations of the Constitution, whether or not justified by the intent of the Founding Fathers. Simply put, the Attorney General wants "conservative" judges, who share his views about abortion, school prayer, civil rights and the like. Mr. Meese believes that federal judges have been "too liberal" or "too activist," whatever these terms may mean.

Therefore, both President Reagan and the Attorney General are seeking to appoint "conservative" judges, in the belief that they will practice "judicial restraint" and renounce "activism."

I do not share their viewpoint, but I do not find it surprising or unusual that a President and an Attorney General should seek to appoint judges who are philosophically at one with them. This is common to almost every President in our country.

But history teaches that President Reagan and Mr. Meese are in for a surprise.

President Theodore Roosevelt appointed Justice Holmes to our highest court, believing that he would be an anti-trust jurist, only to learn very early that the Great Yankee from Olympus did not share the President's views about anti-trust matters.

President Eisenhower appointed Chief Justice Warren and Justice Brennan. The President discovered, to his great chagrin, that these outstanding jurists departed very widely from his concepts about our Constitutional safeguards. President Truman appointed Justice Tom Clark, a trusted advisor and his Attorney General. All accounts indicate that this fiesty President was outraged when Justice Clark voted against Truman's seizure of the nation's steel mills. And surely President Nixon must have been non-plused by Justice Blackmun's pro-abortion decision, let alone its Watergate opinion.

The decisions of the Burger Court, by and large, are further proof of the unpredictability of Presidential judicial appointees.

True, the Burger Court is nibbling away at Miranda, narrowing the exclusionary rule, limiting the safeguards of the Fourth Amendment, tolerating some breaches in the wall of separation between church and state, restricting resort to the great writ of habeas corpus, somewhat tolerant about coerced confessions, and cutting back on other of the Warren Court's decisions, particularly in the area of the rights of the accused in criminal cases.

But! The Burger Court, with the votes of some and in some cases all of the recent "conservative" appointees, has never totally over-ruled Miranda. It has reaffirmed Reynolds v. Sims - one person - one vote; ordered President Nixon to turn over the Watergate tapes; outlawed silent prayer and the instruction of public school children in parochial schools; legalized abortions; sanctioned busing as a permissible tool to eliminate segregation in public schools, and declared publication of the Pentagon Papers, protected by the First Amendment.

The Burger Court has not been as "conservative" as "liberals" feared or as rightists hoped. And, I predict, the same will be true of virtually all of the federal judges who have been or may yet be appointed by President Reagan. The judicial pendulum will swing, as it has, from time to time in the past, with changing personnel. But the clock will not be turned back on a host of libertarian Court decisions.

This leads me to a discussion of repeated attempts to categorize justices as "liberal", "activist" or practioners of "judicial restraint."

The term "liberal" or "activist" judges, who the President and Attorney General Meese criticize for overstepping proper bounds, is not illuminating.

The most "activist" Supreme Court, in our history, were the "nine old men of the 30's." They usurped the power to invalidate virtually all of President Roosevelt's and Congress' New Deal legislation. And this Court was perhaps the most conservative of all times.

By way of contrast, the so-called "liberal" and "activist" Warren Court in Ferguson v. Skrupa (1963) declared: "We refuse to sit as a "superlegislature to weigh the wisdom of legislation, and we emphatically refuse to go back to the time when courts /struck down laws/ regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."

Surely, this opinion is a very model of judicial restraint. And the writer of this unanimous opinion was none other than that outstanding "liberal" jurist, Hugo L. Black.

It is true that all courts, present and past, in varying degrees, are activists in enforcing the liberties enshrined in the Bill of Rights, as distinguished from social and economic privileges.

But, in light of the express language of the Constitution, they cannot, in fidelity, to our fundamental law, do otherwise.

The Bill of Rights is explicit in its terms. "Congress shall make no law respecting an establishment of religion. ... or abridging freedom of speech, or of the press. The right of the people to be secure ... against unreasonable searches and seizures shall not be violated ... no person ... shall be deprived of due process of law; the accused ... shall enjoy the right ... to have assistance of counsel for his defense ... /and/ cruel and unusual punishments /shall not be/ inflicted."

Surely, it would appear that judicial activism in these areas is mandated.

Paradoxically, the Attorney General appears to be a closet believer in the Cult of the Robe. While denigrating decisions of the Court, he, at the same time, exaggerates the role of the judiciary in our constitutional scheme. The late Professor Bickel termed the judiciary to be "The Least Dangerous Branch of our Government."

The mistaken belief that judicial law can fundamentally change our social and economic institutions is evidenced by the flood of young men and women to our nation's law schools and the creation of new law schools. This reflects commendable idealism and does give the bar new voices that should be heard. It is necessary, however, to bear the limiations of the judicial process in mind. Judicial law can help us ensure compliance by government and by our citizenry with the Bill of Rights and valid laws and regulations--matters of transcendent importance.

Judges can invalidate unconstitutional laws and unauthorized executive actions. This also represents the exercise of power, unknown in many countries, including some of the democratic West. But judges cannot, however, establish social and economic justice by judicial fiat.

Directing compliance with a subpoena, even one directed against a president, is one thing--this is judicial stuff; coping with our nation's economic, social and foreign ills is another thing--not judicial stuff.

The courts can do nothing about the deficit, inflation, high interest rates, and unemployment; it is up to the President and Congress to provide the remedy. Yet, the consequences of the failure to reduce the deficit, curb inflation, high interest rates, and check unemployment may be even more menacing to our democratic institutions than the clear danger to them of Watergate. The fate of the Weimar Republic is a stark example.

The courts cannot balance the budget. Only the executive branch and Congress can.

The judiciary cannot seek to persuade the Soviet Union to negotiate an acceptable SALT III Treaty, as envisioned by President Reagan. But our very survival depends upon staying the hand of the nuclear clock, now inexorably advancing to midnight.

Judges cannot bring peace to the Middle East--a problem, of the utmost significance, which thus far has defied the best efforts of the executive branch.

The judiciary lacks the power of the purse and the sword.

Even in the area of judicial competence, like enforcing the Bill of Rights, we must never overlook the profound teaching of Judge Learned Hand: "...a society so riven that the spirit of moderation /liberty/ is gone, no Court can save; a society where the spirit flourishes no Court need save."

The Attorney General ignores what may be at the very heart of the issues he has raised.

Our Constitution is an instrument of practical government. It is also, and more importantly, a declaration of faith in the spirit of Liberty, Freedom and Equality.

The ultimate safeguard of our liberty is the people. They are the source of our Constitution. Its first words are: "We the People of the United States, in order to ... secure the blessing of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." The people are the ultimate guardians and protectors of our liberty, not the President, not Congress, and not the judiciary.

And We the People, if we are to keep our constitutional faith, must always recall the admonition of Thomas Paine:

"Those who expect to reap the blessings of freedom must ... undergo the fatigue of supporting it."

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