SUPREME COURT REDUX

by Edwin D. Reilly, Jr.
for the Sunday Gazette

> "…the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."
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> -Abraham Lincoln, First Inaugural Address, March 4, 1860

Over the last ten years as a regular contributor, I can't recall ever having written an immediate sequel to an opinion piece, but two recent Letters to the Editor regarding my Supreme Court essay of May 27, "Supreme Courts not empowered to declare laws unconstitutional," cannot go without comment. In her letter of June 8, Rebekah Kimble takes me to task with regard to the accuracy of the facts stated in my May op ed. I will address her four points of concern in the order she raised them.

First, Miss Kimble accurately quotes my sentence that ends "… judges too, even Supreme Court justices, can be impeached, and, if convicted, removed from office, but that has never happened." The 'antecedent of 'that" is "Supreme Court justices," not "the federal judiciary" which occurs earlier in the sentence. So her citation of two lower level federal judges who were impeached and convicted is not relevant. And the writer also claims that "Congress has the ability to amend the Constitution" and that this represents the strong check on the Court that I said was missing. But Congress alone cannot do that; all they can do is pass a law that submits a proposed amendment to State legislatures, three-fourths of which must ratify it. This is such a cumbersome process that, subsequent to the adoption of the Bill of Rights, only 17 amendments have been adopted in 224 years.

Miss Kimble wrote that I apparently overlooked Article III, Section II of the Constitution "which grants the Supreme Court the authority to decide whether laws passed by Congress are indeed constitutional." I did not overlook that section, and it most certainly does not say or do what she claims. State laws, yes; federal laws, no. The key passage in Section II is: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have [only!] appellate Jurisdiction.

In Federalist 78, Hamilton wrote "This simple view of [judicial review] suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks."

Thus Hamilton believed that the Court holds only the power of words, and not the power of compulsion upon the other two branches of government. Jefferson felt that we would have less of a democracy if we were to let unelected judges override the laws made by the elected representatives of the people. Chief Justice Marshall disagreed with both, as is indicated by the accurate quote in Miss Kimble's letter. But his mere claim to his Court's having such authority did not amend the Constitution to allow it. Nothing else has done so either.

Miss Kimble's final sentence reads "Contrary to what Mr. Reilly claims, my high school teachers taught it correctly." I cast no aspersions on her teachers. According to Google, Miss Kimble graduated from the Schenectady Christian High School of Scotia last year, has won awards for her poetry, writes for the student edition of the Gazette, and is currently a student at SCCC, both fine schools with fine teachers. I commend Rebekah for writing her letter. I would rather read a thoughtful, critical letter than none at all, and I look forward to reading her work in the Gazette's student edition.

On May 31, Larry Litwin of Scotia wrote "In a single of his sentences lies the crux, a sentence which Mr. Reilly has extended artificially to disingenuously support his twisted argument. That sentence is: "..the Constitution cannot be amended through congressional action that attempts to enhance Supreme Court power through legislation ."

I find this quite puzzling. The full sentence reads "That is, the Constitution cannot be amended through Congressional action [the Judiciary Act of 1789] that attempts to enhance Supreme Court power through legislation; it can only be done via the formal process specified in the Constitution, one that involves elected state and federal representatives of the people." I did not disingenuously or otherwise extend the beginning of someone else's sentence. The full sentence is mine, and I stand by it. I do not run a dishonest pumpkin patch.

Mr. Litwin continues: "The legislative, executive, and judicial branches were established in order to each be a check on the power exerted by each of the other branches. While I agree that the Supreme Court has jumped the tracks and has, in a number of recent decisions, betrayed its mandate, it is nonetheless supposed to be the final defender and arbiter of the Constitution, allowing neither executive nor legislative branches to contravene the Constitution."

"Supposed to be" by whom? Not those who wrote and ratified the Constitution. That check, were it there, would make the Court the strongest of the three branches of our federal government, not, "the weakest," as Hamilton wrote. That it has now become, as Lincoln feared, the strongest branch is due only to unconstitutional "precedents" and the timidity of generations of Presidents.

I am grateful to Harvard historian Jill Lepore for her brilliant essay in the June 18 *New Yorker* called "Benched" on its title page but "The Rise of the Supreme Court" in the table of contents. I have no reason to think that she reads the *Sunday Gazette*, but everything in her analysis is supportive of what I wrote on May 27. It was through her article that I learned of the opening Lincoln quotation.

After six action-packed full pages, Ms. Lepore takes aim at the alleged nullification of the McCain-Feingold Act, the infamous "money is speech" opinion: "Federally, few rulings have wreaked such havoc on the political process as the 2010 case Citizens United v. Federal Election Commission." But, disappointingly, she didn't pull the trigger and fire a specific recommendation as to how to put a fork in it. Here is mine. What President Obama should have said to the Court two years ago, and still could (after a successful reelection of course), is:

"Dear eminent tribunal: Thank you for your opinion with regard to the constitutionality of the non-partisan McCain-Feingold law regarding political donations. But until such time as the Congress sends me sensible legislation that I can sign to replace or amend that law, I will instruct my Attorney General to continue to enforce it."

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Postscript of 1/28/2013: My editors decided that I had too thin a skin (my words, not theirs) and vetoed this submission.