SUPREME COURT OPERATES UNCONSTITUTIONALLY

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

"The Supreme Court, alas, is a political body insisting on pretending otherwise."

-Kevin Phillips, *American Dynasty*, Viking, 2004, p. 103

High-school students are taught that our government, a democratic republic, consists of three co-equally powerful branches, the executive, the legislative, and the judicial, with checks and balances that prevent any one of them becoming too autocratic. If only that were true. The President's check on Congress is that he or she may veto their bills. The counterchecks are that Congress may override vetoes, and the House of Representatives can impeach Presidents for any "reason," however unreasonable, but which does not remove them from office unless the Senate finds them guilty.

The only check of Congress on the federal judiciary is that judges, too, even Supreme Court justices, can be impeached and, if convicted, removed from office, but that has never happened. And the President has no explicitly defined constitutional check on the Supreme Court, and that Court's constitutional check on Congress and the President is equally non-existent. What's that you say, can't it declare all or parts of enacted legislation unconstitutional? They *can*, and have effectively done so, but they *may* not. Nowhere in that hallowed document is such authority granted to it. My friends are astounded when I tell them that.

The Supreme Court, which continues to think otherwise, will be making two significant decisions in June, one regarding an Arizona law that aspires to give the federal government a helping hand in enforcing immigration policy, which is supposedly an exclusive federal responsibility. But the Court is likely to deliver its specialty, a 5-4 decision in favor of that state's Governor, Janice Brewer. Despite evidence to the contrary, Brewer is obsessed with the idea that the Obama Administration is not doing enough to safeguard the borders of her state.

According to the U.S. Department of Homeland Security, President Obama has deported over 1.4 million illegal immigrants in 3-1/2 years and is on pace to deport more in one term than George W. Bush did in two. Brewer is trying to solve a problem that doesn't exist.

Of far greater import will be what the Court decides with regard to the the Patient Protection and Affordable Care Act (Obamacare to its detractors), signed into law by President Barack Obama on March 23, 2010. The principal bone of contention is its "individual mandate" that would force otherwise uninsured persons to either buy health insurance or pay a fine in the form of an added tax. But all other aspects of the new law are so obviously beneficial and, I believe, immune to constitutional challenge, that I expect that the Court will uphold them.

The Supreme Court's temptation to declare federal laws unconstitutional began with the case Marbury v. Madison of 1803.The case stemmed from the second-worst blemish on the record of John Adams. His more egregious action was that he signed the infamous Alien and Sedition Act of 1798 instead of vetoing it. As to those laws, David McCullough, in his magnificent biography *John Adams*, says that "Adams had not asked for them or encouraged [drafting them]. But then neither did he oppose them."

But Marbury v. Madison is not even in the index of the McCullough book, nor do any of my most recent biographies of Thomas Jefferson give sufficient detail. Finally, I went to my oldest source, Dumas Malone's four volume set, *Jefferson the President*, of which volume 4 of 1970, "First Term 1801-1805," was a winner. Here's what happened:

Federalist John Adams lost his bid for a second term when the House of Representatives elected his vice-president, the Democratic-Republican Thomas Jefferson, on its 36th ballot of January 17. Four days before, the Judiciary Act of 1801 became effective, one that authorized the creation of six new circuit

court justices and reduced the authorized size of the Supreme Court from six to five, denying the likely new president an early chance to nominate an Associate Justice. On March 2, two days before Jefferson was inaugurated, Adams filled all six judgeships with loyal Federalists, one the nephew of his wife Abigail. The outraged Republicans called them “Midnight Judges.”

President Jefferson retaliated by ordering his Secretary of State James Madison to withhold issue of the commissions needed to allow the midnight judges to take office. Five said “ho hum” and went about other business, but one, William Marbury, asked the Supreme Court to issue a writ of *mandamus* to order Monroe to execute the purely ministerial act of providing him his commission. “Mandamus” is a Latin word roughly synonymous with “mandate.” Were the Court to issue one, they would be saying “We order you to do such and such and we really mean it!” But the Constitution contains no such word or synonymous concept.

The Chief Justice at the time was John Marshall, appointed by his friend John Adams and confirmed by the Senate’s Federalist majority eight days before Jefferson’s inauguration. Marshall was sympathetic to Marbury’s right to receive his commission, but thought long and hard as to how to accomplish it. He set himself three questions: 1. Did the applicant have a right to the commission? 2. If he did, is there a remedy? 3. If so, is the remedy the issuance of a mandamus by the Supreme Court?

The Marshall Court opined that Marbury did deserve his commission even though he couldn’t prove that he had ever been appointed. As to the second question, jurisdiction was based on Sec. 13 of the Judiciary Act of 1789, which Marbury’s attorney claimed authorized the Court to issue writs of mandamus. The Court disagreed. Using a verbal construction that modern readers are likely to find strange, it said that Congressional action that attempted to enhance Supreme Court power was “repugnant” to the Constitution.

Dictionaries give the first meaning of “repugnant” as “arousing disgust or aversion; offensive or repulsive, such as a repugnant odor.” But the Court meant the second, less familiar meaning”—logically contradictory; inconsistent.” That is, the Constitution cannot be amended through Congressional action 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. So the Court refused to issue a mandamus with regard to poor Mr. Marbury.

But was that refusal equivalent to having declared (part of) the Judiciary Act of 1789 unconstitutional? Here lies a paradox. If it did, then that very declaration was equally repugnant to the Constitution, the issuance of an unconstitutional mandamus, one worthy of even the first definition of repugnant; it smelled, and continues to smell to this day through Marbury v. Madison being accepted as a precedent for all later declarations of unconstitutional congressional-presidential action.

After Marbury, no Supreme Court declared a federal law unconstitutional for 54 years. In 1857, via the infamous Dred Scott decision, the Court refused to rule that a freed slave was a citizen. The decision was a contributing factor to the outbreak of the Civil War four years later. And after the war, the Court geared up in earnest and issued unconstitutional faux-mandamuses at such a rate that by now, 150 federal laws have bit the dust. This must stop, forthwith. Unconstitutional actions of 1803 and 1857 cannot possibly be valid precedents for allowing unelected judges to continue to issue repugnant declarations that are in and of themselves unconstitutional.

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