

THE PRIMARY FUNCTION OF THE JUDICIARY IS TO KEEP IGNORANT LEGISLATORS IN CHECK

By Evan Gutman CPA, JD (2013)

The most significant judicial opinion ever written was probably Marbury v Madison in 1803 because it established the exclusive power of the Judiciary to interpret the law. However, there is no doubt the circumstances of that case (discussed in detail on pages 235-237 in the first part of this book) raise disturbing issues pertaining to the moral character of Chief Justice John Marshall, who wrote the opinion. Nevertheless, as a matter of practicality the case has sustained challenge for over 200 years, and its legitimacy is established.

Marbury stands primary for the premise that the Judiciary alone has the authority to declare laws unconstitutional or to interpret the meaning of laws. In conjunction is the premise that it is the Judiciary's role to decide individual cases. The Judiciary only has the opportunity to interpret laws by deciding individual cases. If it is not presented with a case, then the Judiciary lacks the power to decide the validity or interpretation of any law. Thus, when a Court is presented with a case it always has at least one function. That function is to decide the issue presented to it. It then, may or may not have a second function of interpreting or determining the validity of a law. This depends upon whether the validity or meaning of a law becomes a point of contention between the parties.

The critical question is when should the Court "interpret" a law versus determining its "validity." An interpretation presupposes the law is valid, but that its meaning is not clear. A determination of the validity of a law requires assessing its legality. Obviously it is a more significant Judicial action to declare a law invalid, then it is to simply interpret the law. A conclusion of invalidity carries an element of personal professional risk for a Judge reaching that conclusion because it negates an action taken by a legislature (whether that legislature be Congress or a State).

Legislators are humans subject to the emotional frailties and egotistical weaknesses, which characterize all governmental officials. As humans, it can fairly be presumed that legislators who voted in favor of a law, which a Judge declares invalid will be personally offended by the judicial ruling. The reason for this is as follows. A Judicial conclusion that a law is invalid inherently carries with it a corollary communicative message that the legislature subjected citizens to an illegal enactment. The conduct of citizens should only be

regulated to the extent the laws accomplishing such are valid. However, the enactment of an invalid law is an attempt by the legislature to illegally regulate conduct of citizens. Consequently, it must be concluded that the enactment of an illegal law by a legislator is an immoral act by the legislature. That is a very serious charge for a Judge to make against legislators.

It is a basic predicate of human nature that when one person makes another person look bad by exposing their immorality, that person naturally has a personal incentive founded upon self-interest to make the accuser look bad. In its basest sense, this is often called retaliation or revenge. Consequently, Judges who declare laws invalid are understandably fearful that the legislators who were proven to be immoral by their enactment of an illegal law, may seek political revenge against the Judge.

In contrast, merely interpreting a law is not nearly as offensive to legislators compared to declaring it invalid. This is because when the Court interprets a law, it is only saying that parts of the law require clarification, not that it was improper for legislators to enact the law. The only issue the Court is then dealing with is what the law really means. Thus, from the perspective of Judges, there is a personal incentive resting upon professional self-interest to decline to declare laws invalid if the law can be saved through the use of interpretation. This regretful state of affairs exists even when the law is clearly illegal.

Quite often, a Court effectively declares a law invalid without expressly stating such through utilization of "creative interpretation" of the law by sophisticated manipulation of logic and semantics. On occasion, a Court may cause a law to have the exact opposite meaning as was intended by the legislature through "creative interpretation." When I use the phrase "creative interpretation," I am referring to the Court's primary tools for interpreting laws. Those means consist of defining the words and terms incorporated into a law.

Now, here's the main problem. Legislators come from a wide variety of professional fields and backgrounds. They are typically ignorant of legal issues that are determinative of the validity of a law. There are few legislators who really understand tests of constitutionality. Additionally, the concern of virtually all legislators is simply to keep constituents who support them happy. That's how they get re-elected. Consequently, you have a situation in which legislators have an incentive to enact laws that satisfy voters who elected them, notwithstanding the fact that they lack the knowledge to assess whether such laws are constitutional. It is thus inescapable that a wide variety of unconstitutional laws are regularly enacted. These unconstitutional laws are then enforced against the citizenry until they are presented to a Court for a determination of legality. At that point, the Judge's self-interest in not offending legislators often

takes precedence over his legal duty to fairly determine the law's validity. The Court then uses its escape hatch of applying a contorted interpretation of the law by creatively defining the words and terms in it for the sole purpose of saving an illegal enactment. The result is that unconstitutional laws continue to be regularly imposed unjustly upon the citizenry. It is a product of ignorant legislators adopting ill-conceived laws that are poorly written, which is then combined with the Judiciary's humanistic fear of assessing those laws properly.

The eradication of this problem requires establishment of several principles. Courts need to free themselves from the fear they have of declaring laws unconstitutional, which is traceable to their fear of offending legislators who enacted the laws. There is only one way this can be accomplished. The Courts need to win the support and respect of the general public. Currently, the Courts do not have either the respect or support of the general public because they have not yet earned it. Ultimately, since legislative careers and power rest upon the voting power of the general public, if legislators perceive that the public supports the Courts, they will be more reluctant to engage in retaliatory political action against the Judges who declare laws they enact unconstitutional.

Currently, the only way Judges escape the spirit of revenge that exists amongst legislators is by pacifying them. The Courts pacify legislators by caving into them. They caved into them by adopting strained interpretations of words in a law to save illegal enactments, rather than by proper declarations as to the law's overall validity. While this concededly works rather well from a political perspective for both legislators and Judges, it has a markedly negative impact upon the general public. It effectively causes citizens to lack trust and respect in both legislators and Judges. Stated simply, the public quite correctly perceives that legislators and Judges have teamed up with each other to protect their own respective spheres of influence. And the group they have teamed up against is the general public.

The Judiciary needs to shift its political alliance from legislators to the general public. In order for Judges to develop the requisite courage to properly determine the validity of laws they need to discover how to win the respect and support of the general public. The most significant message Courts can convey to the general public to win support is that Judges will not perform their duties out of self-interest or fear. Rather instead, Judges need to demonstrate they will render rulings and opinions based upon the public's interest. This is not an easy thing to accomplish.

In order for the Judiciary to win public support it needs to prove itself to the public. It needs to demonstrate that Courts will not function out of self-interest or fear. That requires a lot more than transparent, disingenuous public statements by the Judiciary asserting such. It requires Judicial Action proving

such. There is no doubt that disingenuous self-adulating public statements of the Judiciary are incorporated into their rules of conduct. Additionally, judicial opinions give maximum lip-service to the public's interest and falsely assert a lack of self-interest on the part the Judiciary. The problem is that the actions and conduct of the Judiciary do not comport with these messages. And the general public is quite well aware of it. Put simply, the Judiciary is not succeeding in selling anyone with their grandiose "snow job" so to speak.

The best starting point for the Judiciary to develop its moral character in order to win public support would be for it to cease making statements that virtually every member of the general public knows are false. When it makes public statements everyone knows are untrue, the Courts cannot help but be viewed as liars by the citizenry. This immediately precludes any possibility of Courts gaining sufficient public support to obviate the fear Judges have of offending legislators. Two systemic examples are as follows.

State Supreme Court Justices must immediately discontinue rendering statements that are praiseworthy of the legal profession or lawyers as a whole. Simply put, there is probably not a single American who believes those statements. Virtually no one likes or trusts lawyers. Nobody ever has. Taken as a whole, the average citizen, from the person working in the worst paying job to a Wall Street investment banker does not trust lawyers or the legal profession. The prevalence of lawyer jokes demonstrates such.

The degree to which virtually all citizens have detested and lacked trust in lawyers and the legal profession throughout history is pretty much as apparent and unchanging as the existence of the Sun and Moon. The notion that the legal profession is a "time-honored" profession as it is often characterized by Judges, only succeeds in placing it upon a par with the world's oldest profession of prostitution, also recognized as "time-honored." Any Judge who asserts otherwise in light of the overwhelming opinion of the general public, simply can not be expected to receive any support from the public. By doing so, the Judge only succeeds in losing credibility. This then leaves the Judge with no alternative other than to appease the legislators out of fear.

Secondly, Judges need to desist in interpreting laws by defining words in a manner directly opposite from the commonly accepted usage of the term. Legislators need to write understandable laws and it is the job of the Judiciary to insist they begin to do so. If the law is poorly written it should be bounced back to the legislature to rewrite it. Legislative Crap shouldn't be saved by contorted judicial interpretation. If a word in a law requires such a strained interpretation that its meaning drastically differs from the commonly accepted usage of the term by the public, then the Judge needs to have the courage to declare the law invalid. To do otherwise, results in the citizens lacking fair notice of the laws

they are bound by, because the meaning of the words in the law are interpreted irrationally.

This point becomes particularly egregious when the law functions to promote the economic self-interests of lawyers. For instance, the heart and soul of judicial opinions upholding Unauthorized Practice of Law (UPL) prohibitions is the determination that the speaking of words containing truthful legal information constitutes "conduct" and not "speech." Yet, everyone knows that speaking words is speech. You'd have to be a lame Brainiac to assert otherwise. As previously indicated, I fervently believe that if the admissions process to State Bars is fair (which it currently isn't) then reasonable UPL prohibitions will serve an extremely important public interest. The operative term though is "reasonable."

Certainly, I would not envision ever giving my approval to Nonattorneys appearing in Court or signing documents submitted to a Court on behalf of litigants. However, by the same token the notion that having a conversation with someone outside of a courtroom may constitute the Unauthorized Practice of Law on the ground the conversation isn't "speech" is ludicrous. No one can really rationally buy into that concept. If you ask a housekeeper, a guy at a gas station, a check-out person at a supermarket, a drunk sleeping on a park bench, or a Wall Street Investment banker whether one is engaging in "speech" or "conduct" when they talk honestly about legal information, every single one will say its "speech." You don't even need to know about the Constitution or the legal profession to arrive at that conclusion. Speaking is "speech." It's simple as that. Assertions to the contrary simply decrease judicial credibility. This then causes Judges to resort to performing their duties out of fear of legislators instead of bravely determining the validity of laws.

In summary on this issue, most legislators are understandably ignorant regarding the law. It therefore is to be expected that they are enacting an enormous number of unconstitutional laws. The Judiciary needs to start aggressively serving the interests of the general public by properly determining the constitutional validity of laws without hesitation and by using a close, piercing analysis of those laws. Judges can only do this if they have the support of the general public because it can be anticipated they will offend legislators when they take a more aggressive stance in declaring poorly conceived, or poorly written laws unconstitutional. To win the support of the public, Judges need to prove themselves worthy of such support. They can do this by discontinuing the issuance of overtly false statements in their judgments, rulings and opinions. Courts need to desist in saving poorly written laws by interpreting them in an irrational manner, and instead courageously declare those laws unconstitutional. If legislators enact a law using words that can't be understood, then the Courts

need to bounce that freaking dumb-ass law right back to the legislature to try again. And if the legislature does the same thing, you just keep bouncing the law back until they write something that is understandable.

As a general rule, when it comes to Judicial rules of statutory construction of terms and defining words, its a pretty safe bet that if an honest, hard-working Janitor who typically possesses substantially better moral character than the average attorney knows the definition of a word adopted by a Court is stupid and moronic, then it probably is.

I call it the Judicial Janitor Rule of Statutory Interpretation.