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SYMPOSIUM

INTRODUCTION: THE OCTOBER 1996 SUPREME COURT TERM*

The Honorable Sven Erik Holmes†

For the past two years I have had the privilege of introducing this program. The 1996 Term of the United States Supreme Court was by far the most significant in many years. I congratulate the Law School faculty, and other panelists on what promises to be a very interesting program today. Before we get started, I submit for your consideration a few brief introductory comments.

I

First, following the 1995 Term, there was some criticism that the Court was not meeting its responsibility to address important constitutional issues and announce generally applicable principles of law. At this same program last year, I addressed concerns that cases such as *Romer v. Evans*,¹ *United States v. Virginia*,² and *BMW North America, Inc. v. Gore*³ appeared to be limited to their specific facts and articulated no generally applicable principles of law.⁴

By contrast, this term the Court wrestled with vitally important questions,

* Based on remarks delivered at the Conference, *Practitioner's Guide to the October 1996 Supreme Court Term*, at The University of Tulsa College of Law, October 31, 1997.

† United States District Judge for the Northern District of Oklahoma.

1. 116 S. Ct. 1620 (1996).

2. 116 S. Ct. 695 (1996).

3. 116 S. Ct. 1589 (1996).

4. Only one case this Term arguably falls into the category of *ad hoc* jurisprudence. In *Chandler v. Miller*, 116 S. Ct. 1295 (1997), the Court tortured Fourth Amendment jurisprudence to overturn a Georgia statute requiring that candidates for designated state offices pass a drug test in order to qualify for nomination.

and articulated specific guiding principles for use by government actors, including, among others, federal judges such as myself. Thus, the Court clearly fulfilled its role as the ultimate decision-maker in our society—weighing precedent, tradition, and morality to determine the law of the United States.

Moreover, the subject matter of the opinions issued this term was compelling. For example: *Washington v. Glucksberg*⁵ and *Vacco v. Quill*⁶ held that a state may prohibit doctor-assisted suicide; *Reno v. American Civil Liberties Union*⁷ held that Congress lacks the power to criminalize the display of indecent material on the Internet; and *Agostini v. Felton*⁸ held that public school teachers may teach federally-financed classes on the premises of parochial schools.

The Court demonstrated that it is not how many cases the Court chooses to accept, but rather which cases, of the approximately 8,000 filed, the Court chooses to decide. Indeed, this term the Court decided 80 cases, only five more than last year's record low.⁹

II

Second, this term the Court clearly reflected the political tradition that brought six justices to the bench. In 1981, President Ronald Reagan stated in his first inaugural address:¹⁰

We are a nation that has a government—not the other way around. And this makes us special among the nations of the Earth. Our Government has no power except that granted it by the people. It is time to check and reverse the growth of government which shows signs of having grown beyond the consent of the governed.

It is my intention to curb the size and influence of the Federal establishment and to demand recognition of the distinction between the powers granted to the Federal Government and those reserved to the States or to the people. All of us need to be reminded that the Federal Government did not create the States; the States created the Federal Government.

Thereafter, Presidents Reagan and Bush appointed Chief Justice William Rehnquist and five Associate Justices to the Supreme Court. The Court's recent jurisprudence suggests that a majority of these appointees have undertaken to make their political philosophy the law of the land. Briefly summarized, this philosophy maintains that the nation's capital in general—and the United States

5. 117 S. Ct. 2258 (1997).

6. 117 S. Ct. 2293 (1997).

7. 117 S. Ct. 2329 (1997).

8. 117 S. Ct. 1997 (1997).

9. The highest number of cases the Court has decided was 151 in both the 1982 and 1983 Terms. *See generally, Statistical Recap of Supreme Court's Workload During Last Three Terms*, 53 U.S.L.W. 3028 (1984).

10. Ronald Reagan, Inaugural Address (Jan. 20, 1991), reprinted in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RONALD REAGAN-1981 2 (U.S. Gov't. Printing Office 1982).

Congress in particular—should play a less dominant role in the daily life of the American people—and that the power exercised by this so-called “federal establishment” should be systematically curtailed. This theme could well be entitled “Who Do These People Think They Are?”

In this regard, four cases in particular merit your attention:

In *City of Boerne v. Flores*,¹¹ the Court struck down the Religious Freedom Restoration Act,¹² which prohibited government from substantially burdening a person’s exercise of religion unless the burden “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”¹³ The Court held that Congress lacked the power to, in effect, supersede by statute otherwise applicable constitutional principles articulated by the Supreme Court.¹⁴ Indeed, the first principle of constitutional law, as held in *Marbury v. Madison*,¹⁵ is that it is for the Court, and no one else, to “say what the law is.”¹⁶ In short, who do the members of Congress think they are?

In *Printz v. United States*,¹⁷ the Court struck down the Brady Handgun Violence Prevention Act,¹⁸ which commanded the chief law enforcement officer of each local jurisdiction to conduct background checks on prospective handgun purchasers until a national system has been established. The Court held, with exhaustive reference to various sections of *The Federalist*, that the Act violated state sovereignty principles and thus could not be a law “proper for carrying into execution” delegated powers within the meaning of the Necessary and Proper Clause.¹⁹ The majority opinion by Chief Justice Rehnquist concluded that Congress simply did not have the power to compel action by state government actors. In short, who do the members of Congress think they are?

It is important to note that the dissent by Justice Stevens quoted from *The Federalist* with equal zeal and extravagance.²⁰ In the end, these competing opinions resemble a made-for-television kidnaping movie where the ransom note is assembled from various words cut out of Life magazine. The effect, of course, is that each side reached a different conclusion while claiming to reflect the intent of the Framers as documented by the *Federalist Papers*: I respectfully suggest that a more constructive approach would be to spend less time scuffling over the legacy of James Madison and Alexander Hamilton, and more time

11. 117 S. Ct. 2157 (1997).

12. 42 U.S.C. § 2000bb to bb-4.

13. *Id.* § 2000bb-1.

14. *Boerne*, 117 S. Ct. at 2162-68.

15. 5 U.S. (1 Cranch) 137 (1803).

16. *Id.* at 177.

17. 117 S. Ct. 2365 (1997).

18. 18 U.S.C. § 922 (Supp. 1997).

19. *Printz*, 117 S. Ct. at 2379.

20. Such extensive references to the same source in support of drastically different conclusions could lead one reasonably to ask “Are these justices all reading from the same version of *The Federalist*?” In fact, it would appear they are not. In *Printz*, the majority cited as authority “*The Federalist* (C. Rossiter ed., 1961).” *Id.* at 2372. By contrast, the dissent cited “*The Federalist* (E. Bourne ed., 1947).” *Id.* at 2388 (Stevens, J. dissenting).

articulating well-reasoned, guiding principles of law based on precedent and constitutional jurisprudence. A poorly reasoned or impractical result does not improve because a selected portion of the *Federalist Papers*, taken out of context, appears to give it some support.²¹

In *Clinton v. Jones*,²² the Court held that a sitting President could be forced to defend a civil lawsuit based on actions outside of his or her official duties. The leader of the "federal establishment" is not above the law. In short, who does the President think he is?

And, finally, in *Raines v. Byrd*,²³ the Court rejected a challenge to the Line Item Veto Act²⁴ by six members of Congress on the grounds that the alleged diminution of their power as legislators lacked sufficient concrete injury to give them legal standing to bring suit. This case gives the Court an opportunity to belittle the federal establishment not once—but twice. First, in *Raines*, the Court availed itself of the opportunity to throw members of Congress out of court while lecturing them on the limits of their authority. Listen to the tone of the opinion:

If one of the members were to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead. The claimed injury thus runs (in a sense) with the member's seat, a seat which the member holds (it may quite arguably be said) as trustee for his constituents, not as a prerogative of personal power.²⁵

In short, who do these people think they are?

A second opportunity to diminish Congress, of course, will arise when the Court eventually, and in all likelihood, strikes down the Line Item Veto Act.²⁶ This future opinion, no doubt, will cite *The Federalist No. 78*,²⁷ notable in part for characterizing the judiciary as the "least dangerous"²⁸ branch of government "because it will be least in a capacity to annoy or injure."²⁹ In that paper, Alexander Hamilton wrote:

The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword

21. In the introduction to his text of *The Federalist*, Clinton Rossiter states that "by common consent of learned opinion, the following numbers are the cream of the eighty-five papers: 1, 2, 6, 9, 12, 14, 15, 16, 23, 37, 39, 47, 48, 49, 51, 62, 63, 70, 78, 84, 85 . . ." *THE FEDERALIST* (C. Rossiter ed., 1961), at p. xvii. In *Printz*, 117 S. Ct. 2379, *passim*, the majority cites *The Federalist* some 20 times and the dissent some 10 times. It is noteworthy, however, that the majority cited the 21 papers identified by Professor Rossiter as authoritative only 5 times, and the dissent only once. Thus, what was previously accepted by scholars as forming the essence of *The Federalist* has now been abandoned in a frenzied effort to claim some historical (as opposed to jurisprudential) antecedent for every statement or proposition of law.

22. 117 S. Ct. 1636 (1997).

23. 117 S. Ct. 2312 (1997).

24. 2 U.S.C. §§ 691-92 (Supp. 1997).

25. *Raines*, 117 S. Ct. at 2318.

26. 2 U.S.C. §§ 691-92 (Supp. 1997).

27. *THE FEDERALIST NO. 78* (Alexander Hamilton) (M. Beloff ed., 1987).

28. *Id.* at 396.

29. *Id.*

or the purse; no direction either of the strength or the wealth of the society, and can take no active resolution whatsoever. It may truly be said to have neither force nor will, but merely judgment; and most ultimately depend upon the aid of the executive arm even for the advocacy of its judgments.³⁰

Clearly, the power of the purse is essential to the role of the legislative branch, and thus any statutory transfer of that power to the executive alters the fundamental structure of our government.

It merits attention that these cases reflect not only a political philosophy, but also a commitment to implement that political philosophy. Historically, “judicial activism” has been defined as identifying individual rights in the Constitution which operate as a shield against certain legislative action; “judicial restraint” has been defined as permitting the legislature to enact laws without interference from the courts. First in *United States v. Lopez*³¹ in the 1994 Term and *Seminole Tribe of Florida v. Florida*³² in 1995, and now in *City of Boerne*³³ and *Printz*,³⁴ the Supreme Court determined that the U.S. Congress did not have the authority to act at all. I ask you to consider whether this is another form of judicial activism. Rather than identifying individual rights, which has the effect of prohibiting legislation, this form of judicial activism identifies constitutional limits on the legislative branch, which has the same effect.

The Constitution establishes clear and appropriate limits on judicial authority. The guiding principle in our system of justice is that courts are responsible for interpreting the law and not making the law. Judicial restraint properly requires that judges show great deference to the acts of the legislative branch and not legislate from the bench. Courts that fail to exercise judicial restraint are in effect substituting their views for those of elected officials. Therefore, the question becomes whether the efforts of the Supreme Court to implement a political philosophy properly respect these principles of judicial restraint.

III

My third comment is confined to a single issue. In each of the last two years, the Supreme Court routinely rejected all government actions based on race. Consistently, this term in *Abrams v. Johnson*,³⁵ the Court upheld a judicially created re-districting plan that established only one black majority district, notwithstanding the documented desire of the Georgia state legislature to create at least two, if not three, majority black districts. The previous plan developed by the Georgia legislature had been overturned by the Supreme Court on the

30. *Id.*

31. 115 S. Ct. 1624 (1995).

32. 116 S. Ct. 1114 (1996).

33. *Boerne*, 117 S. Ct. 2157.

34. *Printz*, 117 S. Ct. 2365.

35. 117 S. Ct. 1925 (1997).

grounds that race had been a predominant factor in drawing at least one of the resulting Congressional districts.

The Court continues to reflect an animosity toward all government efforts to address racial issues. We can anticipate that this trend will continue in the 1997 Term in the *Piscataway Township Bd. of Educ. v. Taxman*.³⁶ Therefore, the question becomes how a democratic society should deal with very serious problems of race when its elected representatives are not permitted by the Supreme Court to develop and implement solutions that take race into account.

IV

My final comment deals with the criminal law. The Court appears to dislike criminals even more than it dislikes members of Congress. To that end, in *Ohio v. Robinette*,³⁷ the Court unanimously held that once the police had stopped a car for a traffic infraction, they may go on to request the driver's permission to search for drugs without informing the driver that he is in fact free to decline a search and go on his way; in *Maryland v. Wilson*,³⁸ the Court held that the police may routinely order passengers out of a car when the driver has been pulled over for an ordinary traffic violation—the police need not suspect that the passenger has committed a crime or presents a danger; and, in *Kansas v. Hendricks*,³⁹ the Court upheld a Kansas state law that provides for the civil commitment of persons who, due to a "mental abnormality" or a "personality disorder" are likely to engage in "predatory acts of sexual violence." This Sexually Violent Predator Act⁴⁰ allows sexually violent predators to be confined indefinitely in a mental hospital after having completed their prison sentences.

An exception to this near-uniform treatment of claims by criminal defendants was *Lindh v. Murphy*.⁴¹ In *Lindh*, the Court held that the 1994 Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),⁴² which streamlined the habeas corpus appeals process, did not apply retroactively to petitions already pending on the date of enactment.⁴³ This case is significant because it clarified an issue that is essential to the proper administration of the criminal justice system. Such clarity will assist federal judges, such as myself, to move cases more swiftly and effectively toward a final resolution—which, in my judgment, is critically important if we are to maintain confidence in our system of law.

I confess my interest in the Court's opinion in *Lindh* is personal. I sat by

36. 117 S. Ct. 2506 (1997).

37. 117 S. Ct. 417 (1996).

38. 117 S. Ct. 882 (1997).

39. 117 S. Ct. 2072 (1997).

40. KAN. STAT. ANN. §§ 59-29a0 to a17 (1994)

41. 117 S. Ct. 2059 (1997).

42. 28 U.S.C.A. 2254(d) (Supp. 1997).

43. *Lindh*, 117 S. Ct. at 2061.

designation with Judges Ebel and Logan on the Tenth Circuit Court of Appeals panel that reached the same result as the Supreme Court in a footnote to a case styled *Edens v. Hannigan*.⁴⁴ This result was criticized by the Seventh Circuit when it decided *Lindh v. Murphy en banc*.⁴⁵ The Seventh Circuit's opinion in *Lindh* rejected the Tenth Circuit's conclusion that the intent of Congress regarding retroactivity was clear by negative implication, based on a strict construction of the statute. The Supreme Court, however, upheld both the approach and conclusion of the Tenth Circuit.

In any event, these are just some of the highlights of the 1996 Term of the Supreme Court. Again, I congratulate the University of Tulsa College of Law for its continued good work in the area of constitutional law.

44. 87 F.3d 1109, 1112 (10th Cir. 1996). In applicable part, footnote 1 in *Edens* provides as follows: The amendments also create a new chapter 154 in Title 28, which provides special habeas corpus procedures in capital cases. The only effective date provision specified within Title 1 of the habeas corpus amendments is under the special death penalty litigation procedures, which states that those provisions shall apply to cases pending on or after enactment. *See* Section 107(c). *Edens* filed his petition pursuant to 28 U.S.C. § 2254 in the district court on November 16, 1992; he filed his notice of appeal on October 12, 1994; and a certificate of probable cause was issued pursuant to Rule 22 on October 17, 1994, all well before the new habeas corpus amendments were enacted. Under these facts we conclude that the new law does not apply to this case.

45. *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996).

