



The Third Branch of Government

by Doug Stout

During his State of the Union speech on January 27, with most of the United States Supreme Court sitting before him as invited guests in the House of Representatives legislative chamber, President Obama chose to issue a stinging criticism of the court and its recent decision regarding the First Amendment of the Constitution's provision regarding "free speech" and its application to corporate expenditures. As Americans we are all free at any time and in almost any setting to criticize our government; it is at the essence of those "free speech" guarantees. However, public officials and most of all the President of the United States should use more discretion in the form, the time, and the place, to make certain criticisms. First, there is the seemingly lost art of common courtesy. The United States Supreme Court Justices are head of the Judicial Branch of the Federal Government, a branch which is designed to be co-equal with the Executive Branch, led by the President. The Justices of the Supreme Court are not Administration employees who answer to President Obama; they were extending a courtesy and showing the unity of the American political system by accepting the invitation to be honored guests. You shouldn't take the opportunity presented by the presence of a guest to level harsh criticism in their face.

The President himself was a guest of Congress, the third and also co-equal Legislative branch of government. This is one reason it was an inappropriate forum for shouted criticisms from the House floor as happened when the President addressed Congress on health care last fall. As our parents used to tell us...there is a proper time and place for everything. President Obama, having some background in legal etiquette, at least had the courtesy and awareness to ad-lib a line into his prepared remarks. He added "With all due deference to separation of powers," to his speech as he stood at the podium. He then leveled a harsh criticism of the court's decision in the case of "Citizen's United v. Federal Election Commission" which they had recently decided. The *Des Moines Register* editorialized on the appropriateness of the place and tone of his remarks:

Obama's remarks were not just rude but a case of political opportunism that contributes to public misunderstanding of the role of the court to interpret the Constitution. This was especially disappointing coming from Obama, a former law professor who knows the court's job is to make decisions without regard for public sentiment. The president should have avoided the subject altogether. Instead, in his speech, he took issue with the court's Jan. 21 ruling striking down as unconstitutional a federal law that prohibited political expression by groups organized as corporations...Obama prefaced his remarks by saying, 'With all due deference to separation of powers,' but in fact he showed no deference to the court and the members seated before him. It would not be surprising for them to skip next year's speech.¹

The court's ruling and its ramifications are a topic for another time. However, it is at best an "open question" as to whether the President's criticism on the issue was an accurate portrayal of their decision. If not an actual mischaracterization; it was certainly a highly opinionated portrayal of the court's decision.

My concern is that the President's remarks were just the epitome of the trend for elected officials to politicize the decisions of our courts. The President did not start the trend. It is common among politicians of both parties and across the political spectrum to bring the decisions of the courts into the political dynamic. There are many reasons for this evolution, and it is certainly not new. However, the President did put an exclamation point on the issue when he inserted the remarks in the solemn historical moment of his State of the Union Address.

My concerns were expressed well by Peter G. Verniero, a former justice on the New Jersey Supreme Court, who said the following: "The court's legitimacy is derived from the persuasiveness of its opinions and the expectation that those opinions are rendered free of partisan, political influences. The more that individual

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justices are drawn into public debates, the more the court as an institution will be seen in political terms, which was not the intent of the founders.”²

The role of our court system is to be the final arbiter of what our laws and what our Constitutional provisions actually mean. They are meant to operate free from political influences and from the sentiment of the moment. This does not mean that you or I, or any other member of American society, have to agree with that interpretation, but at the end of the day there has to be someone with a final say on what a law or provision means and how it is applied to the fact situation before the court. In our Constitutional system, that final arbiter is the United States Supreme Court.

When we disagree with the policy results of a court decision, it is our obligation and our right to try to change the policy. The prescribed Constitutional way to accomplish that means is to change and clarify the law or the Constitutional provision which we feel has been interpreted in a way that is detrimental to American society. The Legislative and the Executive Branches of government...the branches which are supposed to be responsive to the people...have an obligation to do so. If they do not respond, our system has a built in remedy; their removal in the next election.

I am not naïve enough to think that every court decision is a “correct” or a “good” interpretation of the law. Serious students of the law will find points of disagreement with many decisions the courts make. Activist judges, who try to go beyond their role and authority and legislate policy changes from the bench, also contribute to the erosion of trust in the Judiciary’s necessary role in our society. It creates enormous frustration when the court is viewed as going beyond interpreting the law and intentionally tries to create new law. However, be that as it may, there has to be a final arbiter under our system as to what current law means. Our Constitutional system says that final arbiter is the United States Supreme Court.

Our system is not perfect. As Winston Churchill once said about Democracy in general: “Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time.”³

We must work to make our system better and to strengthen rather than tear down our core institutions. One way for serious statesmen and women to do so is to choose their words carefully when they strongly disagree with a court decision. We must strive to attack the policy result that offends us and not to undermine the institutions which delivered it. We must seek the remedies that are available to us under our system of laws. Attacking the Members of the court, or their motives, merely serves to further politicize an essential institution which must have credibility for our system to survive intact.

In Iowa, we have the legitimate option of voting not to retain Iowa Justices who we do not feel are properly fulfilling their roles on the bench, through periodic retention elections. At the federal level we must elect Presidents who will pick well-qualified people who will properly fulfill their role as interpreters of law...and not makers of law. We should also not allow our elected officials to “blame” the court for that which is in the power of the legislative body to change, either through modifying statutes, or through starting the proper constitutional process to allow the people to decide on what their constitution should say on any given matter of the day. Our system of “checks and balances” means that no one branch of government ever has the final say. Legislators should focus less on “blame” and more on addressing policy solutions to court decisions which lead to bad public policy.

(Endnotes)

¹ “This scolding crossed the line,” *Des Moines Register* Editorial, January 30, 2010, <http://www.desmoinesregister.com/print/article/20100130/OPINION03/1300315/This-scolding-crossed-the-line> (February 3, 2010).

² Adam Liptak, “Supreme Court Gets a Rare Rebuke, in Front of a Nation,” *The New York Times*, January 29, 2010, <http://www.nytimes.com/2010/01/29/us/politics/29scotus.html> (February 3, 2010).

³ Winston Churchill, speech, House of Commons, November 11, 1947, in *Respectfully Quoted: A Dictionary of Quotations*, <http://www.bartleby.com/73/417.html> (February 3, 2010).

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