

CHALLENGES FACING OUR SYSTEM OF JUSTICE

Edwin Meese III[†]

It is a real honor to have been asked to give the Fourth Annual Ave Maria Lecture, following three friends, Clarence Thomas, Ken Starr, and Michael Novak. Their shoes are big shoes to fill, and I humbly hope that I can follow in the pattern they have set here.

One thing that lawyers, judges, and prospective lawyers have in common is that we are surrounded by decisions. There are judicial decisions, there are client decisions, there are decisions on how to handle cases, and there are decisions on how to resolve litigation. There is a story going around Washington these days about decision-making and about one lawyer who was particularly good at making decisions. And so a newspaper reporter asked him one day how it was that he had gotten this reputation as a good decision-maker. The lawyer said, "Well, I have two rules. The first is, know where you're going and what you want to achieve, and second, understand and appreciate the obstacles that stand in your way."

Then the lawyer told an anecdote to explain those maxims. It was a story about a Navy captain in World War II. The captain was given command of a battleship. He was quite proud of his command because there were few battleships in the Navy, and he was one of a select dozen or so to have such a command. All went well until one particular evening when he was guiding his ship into an unfamiliar harbor after nighttime Naval maneuvers at sea. Everything was blacked out, total darkness. Suddenly, as he rounded a bend in the coastline, a bright light confronted him up ahead; it was a blinding light, and he realized they were on a collision course. Well, in those days there was radio silence, it being wartime, so they used blinking lights to send messages between ships. Some of you can remember those old movies where they blinked out messages. So he had his signalman on the bridge blink out a message: "Attention, we are on

[†] Edwin Meese III is the Ronald Reagan Distinguished Fellow in Public Policy at the Heritage Foundation. Mr. Meese was U.S. Attorney General under President Ronald Reagan from February 1985 to August 1988. On April 27, 2004, Mr. Meese delivered this speech at the Fourth Annual Ave Maria Lecture in Ann Arbor, Michigan.

collision course. Steer two degrees south to avoid collision." He was quite surprised by the responding message that blinked back. It said, "I see you. You must steer two degrees north to avoid collision." The captain was quite upset by this affront to his dignity, so he sent a more imperious message. It said, "Steer two degrees south, this is Captain Roger Jones, United States Navy." Back flashed the reply, "You must steer two degrees north. This is Petty Officer Second Class David Green, United States Coast Guard." Finally, the captain, absolutely apoplectic, sent a final message and said, "I have the right of way. This is a battleship." Immediately the reply came back, "No you don't. This is a lighthouse."¹

Well, I thought I would apply that lawyer's two maxims tonight as I speak to you on the topic that was mentioned: "Challenges Facing Our System of Justice." I think, as officers or potential officers of the court, our motivation as professionals is to preserve the rule of law and the constitutional system of government that serves it. One obstacle to achieving that goal is reflected in a battle that is currently going on in Washington, D.C. That battle is over whether the federal judiciary will continue its constitutional role as an independent branch of government, dedicated to applying the law as promulgated by the other two elected branches, or whether the federal courts will be politicized by congressional intimidation and unleashed from their constitutional moorings. This goes beyond what we might think of as inter-party or partisan wrangling. Many people today are talking about what is going on in the Senate, and the problem of getting judges confirmed, as a constitutional crisis.² Many people believe it is a crisis because it goes beyond the politics of the issue. What is happening is that a minority of the Senate is using the filibuster to prevent judicial nominees, who are eminently qualified and have been approved by the Senate Judiciary Committee, from being voted

1. The lighthouse in Mr. Meese's illustrative anecdote has been ordered about by the captains of a variety of ships over the decades. See Barbara & David P. Mikkelson, *The Obstinate Lighthouse*, Urban Legends Reference Pages (Sept. 23, 2002), at <http://www.snopes.com/military/lighthse.htm> (on file with the Ave Maria Law Review).

2. See, e.g., Anne Q. Hoy & Ken Fireman, *Angry GOP Wants to Change the Rules: Would Make It Harder to Block Nominations*, NEWSDAY, May 10, 2003, at A4 ("In his remarks, [President George W.] Bush attempted to elevate the dispute to the level of a constitutional crisis.").

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upon on the floor of the Senate.³ This is unprecedented in the history of our country.⁴

The judicial nominees themselves have demonstrated outstanding legal ability. In many cases they have served as judges on state courts, and in some cases on lower federal courts. Many of them are minorities and women. You have undoubtedly read about the nominees, some of whom have waited nearly three years to have their nominations voted on.⁵ All of the candidates for these judgeships, who are being opposed by the Senate minority, have one thing in common. They are all dedicated to the rule of law and to the role of judges as prescribed in the Constitution; that is, to apply the law as it is written in the Constitution and statutes, not to make the law according to their own beliefs, their own biases, or their policy preferences. These nominees recognize that making the law is the responsibility of the people's representatives, those elected by the people to Congress or to State legislatures.

Why is this battle taking place? I mentioned that many people believe this is a constitutional crisis. That is because the battle goes beyond mere politics. It affects the basic foundation of constitutional government, and involves the importance of preserving an independent judiciary. The question is whether we will have impartial, objective judges, as contemplated by the Constitution, or whether we will have judges on the bench who are willing to follow the dictates of senators, many of whom appear beholden to political forces that are seeking to impose, through the courts, a leftist agenda that they would never get through legislative bodies that are made up of representatives who are elected and responsible to the people themselves.

Judge Robert Bork has spoken and written about this issue. You are going to hear a lot about Judge Robert Bork from me here tonight because he stands as one of the most stalwart defenders of the

3. Months after Mr. Meese's speech, the stalled judicial appointments issue continued to plague President Bush. See, e.g., Neil A. Lewis, *Mixed Results for Bush in Battles over Judges*, N.Y. TIMES, Oct. 22, 2004, at A1.

4. See Ronald D. Rotunda, Editorial, *Senate Rules Abused to Keep Filibusters: Filibusters Cannot Be Used to Prevent Changes in the Rules that Govern Filibusters*, CHI. SUN-TIMES, July 4, 2003, at 29 (describing the modern filibuster as "much more powerful than its historical predecessor").

5. See, e.g., *Filibuster Delays Judge Promotion*, AUGUSTA CHRON., Oct. 31, 2003, at 10A (detailing the qualifications of Judge Charles Pickering, whose confirmation has been filibustered by the Senate minority).

Constitution. Besides, in a crowd like this, why not quote a professor who teaches at Ave Maria. But Robert Bork put it well in his book, *The Tempting of America*, when he said,

The orthodoxy of original understanding, and the political neutrality of judging it requires, are anathema to a liberal culture that for fifty years has won a succession of political victories from the courts and that hopes for more political victories in the future. The representatives of that culture hate the American orthodoxy because they have moral and political agendas of their own that cannot be found in the Constitution and that no legislature, or at least none whose members wish to be reelected, will enact. That is why these partisans want judges who will win their victories for them by altering the Constitution.⁶

The Senate minority that I spoke about seeks to intimidate prospective judges by imposing litmus tests concerning particular issues and by asking questions in the committee hearings about how a nominee would vote on a specific question that might come before him or her once he or she assumes the bench.

Such attempts to obtain commitments on future judicial actions and decisions, where neither the actual facts of a particular case nor the applicable legal principles are known, and where such commitments are demanded as the price for being confirmed, certainly destroy the concept of an independent judiciary. The Founders knew this well. They believed in the rule of law and thought that it could be preserved only by a government of laws and not of men. In other words, they sought a government that was ruled by established standards and not by the arbitrary exercise of authority by government officials who make up their own rules. For the Founders, the rule of law meant that standards of conduct must, first of all, be definite, so that people would know what is prohibited or required. Second, they must be applied neutrally, in the same way for everyone, and not with one application for some in high places, and another for others who are not so high. Third, they must be consistent, in the sense that they must be the same today and tomorrow as they were yesterday, not changing on the basis of whim and caprice. Obviously, laws can be changed, but they must be

6. ROBERT H. BORK, *THE TEMPTING OF AMERICA* 7 (Simon & Schuster, Touchstone 1st ed. 1991) (1990).

changed through due process, and in a democratic republic that means by representatives elected by the people.

In 1787, as our Founders wrote the Constitution, they knew that a government of laws was absolutely essential to preserving freedom. And that Constitution they wrote has been replicated and used as the basis for the constitutions of other nations throughout the ensuing two centuries.⁷ It demonstrated that a written constitution and courts that were independent, but that were also faithful to their role of effectively applying that constitution, were essential to free peoples any place in the world. The Founders knew that order and security were necessary, but at the same time they recognized that such goals should not be obtained at the expense of liberty. That is why we have, in this country, a written constitution with its checks and balances, including the concept of federalism in allocating governmental power and authority between the states and the central government. We have a limited national government that is entitled to exercise authority only on the basis of powers enumerated in the Constitution. To some extent the ideas of the Founders, particularly the doctrine of enumerated powers, have been eroded over the years, yet they still stand as guiding principles that are often observed at least by mention, if not by actual fact.

But, the key to the constitutional system in 1787, and what continues to be the key today, is an independent judiciary. Such a judiciary was a new idea in its time and was in direct contrast to the king's judges who had ruled the colonists, often with an iron hand. If the king or his governors did not like what judges did, they removed the judges from office or lowered their compensation. Such intimidation was used as a means of getting the judges to do the will of the king and his henchmen. In contrast to such practices, the Constitution provides certain protections for the judiciary. One is life tenure for federal judges or, as the Constitution says, tenure "during good behavior."⁸ Secondly, their compensation cannot be reduced during their terms in office.⁹ But, while these protections were established to preserve an independent judiciary, judges were not given *carte blanche* to do anything they wanted. Instead, the

7. See Albert P. Blaustein, *The U.S. Constitution: America's Most Important Export*, 9 ISSUES OF DEMOCRACY 6 (Mar. 2004), at <http://usinfo.state.gov/journals/itdhr/0304/ijde/ijde0304.pdf> (on file with the Ave Maria Law Review).

8. U.S. CONST. art. III, § 1.

9. *Id.*

Constitution, and the *Federalist Papers*, which explained the Founders' intent, spell out what the role of the judge is.¹⁰ And that is, of course, to interpret the law, and not to make the law. There is no mandate to become judicial dictators. Robert Bork describes this in *The Tempting of America*: "There is no faintest hint in the Constitution, however, that the judiciary shares any of the legislative or executive power. The intended function of the federal courts is to apply the law as it comes to them from the hands of others."¹¹ That is why Alexander Hamilton, writing in *Federalist No. 78*, was able to say that "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them."¹² He went on to say that the legislative branch had the power of the purse, the executive branch had the power of the sword, but the judicial branch had only judgment.¹³ I would suggest that Alexander Hamilton was probably a great military officer, a very accomplished statesman, and a fine Secretary of the Treasury, but he did not do very well as a prophet. We have seen too often how some judges have gone beyond their constitutional authority and usurped the power of the legislative and executive branches.

What the Senate minority is doing is attempting to politicize the federal courts and encouraging this kind of departure from the constitutional role of judges. These senators are encouraging nominees to become judicial activists, casting off their robes of judicial restraint and impartiality, and assuming the role of legislators on the bench. The senators are seeking to confirm only those who would impose by judicial fiat what political special interests could never obtain through elected legislatures.

Joseph Califano is a man for whom I have a great deal of respect, particularly for what he has done in the field of drug abuse prevention. He was on the White House staff and a cabinet member in the administration of Lyndon Johnson. Either knowingly or inadvertently he gave the game away recently when he wrote an

10. See U.S. CONST. art. III; THE FEDERALIST NO. 47 (James Madison), NO. 78 (Alexander Hamilton).

11. BORK, *supra* note 6, at 4.

12. THE FEDERALIST NO. 78, at 284 (Alexander Hamilton) (David Wootton ed., 2003).

13. *Id.*

article in the Washington Post about the role of the courts.¹⁴ What he said really capsulizes what is going on in the Senate today. Califano said that what is new in the growing role of federal courts in crafting national policies, once considered the exclusive preserve of the legislative and executive branches, is that “[w]ho sits in federal district and appellate courts is more important than the struggle over the budget, the level of defense spending, second-guessing the tax bill and whose fingers are poised to dip into the Social Security and Medicare cookie jars.”¹⁵ He talked about special interests going to courts with petitions they once would have taken to legislators or to executive appointees.¹⁶ “Environmentalists,” he said, “prison reformers and consumer advocates have learned that what can’t be won in the legislature or executive may be achievable in a federal district court where a sympathetic judge sits.”¹⁷ Califano did not lament this trend. Rather, he said that the Senate should be all the more vigilant in approving judges who will serve, in effect, as extensions of the legislature.¹⁸ If anything can be farther from what the Founding Fathers had in mind, it is this idea that judges should depart from interpreting the law, and instead should become some sort of a super-legislature.

As I say, Joseph Califano thinks this is a good thing, but Robert Bork, as you might imagine, takes the other side of the argument. In his view,

The democratic integrity of law . . . depends entirely upon the degree to which its processes are legitimate. A judge who announces a decision must be able to demonstrate that he began from recognized legal principles and reasoned in an intellectually coherent and politically neutral way to his result. Those who would politicize the law offer the public, and the judiciary, the temptation of results without regard to democratic legitimacy.¹⁹

14. Joseph A. Califano Jr., Editorial, *Yes, Litmus-Test Judges*, WASH. POST, Aug. 31, 2001, at A23.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* (encouraging the Senate to “take enough time to give these men and women the kind of searching review their sweeping power to make national policies deserves”).

19. BORK, *supra* note 6, at 2.

He goes on to say that “in the larger war for control of the law, there are only two sides. Either the Constitution and statutes are law, which means that their principles are known and control judges, or they are malleable texts that judges may rewrite to see that particular groups or political causes” come out as winners.²⁰ Robert Bork has given us in the twenty-first century the same warning that James Madison wrote more than two hundred years ago. As Madison said, to combine judicial power with executive and legislative authority is “the very definition of tyranny.”²¹ What the Senate minority is encouraging today is that judges depart from that constitutional role and engage in such judicial tyranny.

Other presidents have had similar concerns. You can look, for example, at Thomas Jefferson, who was very much concerned about judicial supremacy.²² Jefferson was worried that too powerful courts would place us under what he called “the despotism of an oligarchy.”²³ Abraham Lincoln also was much concerned about the court exceeding its constitutional powers. He warned of this in his first inaugural address when he said that “the candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people”—and that would include the type of moral issues that the Supreme Court has from time to time arrogated unto itself—“is to be irrevocably fixed by decisions of the Supreme Court . . . 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.”²⁴

Unfortunately, Congress has, to a great extent, become complicit in increasing the ability of the courts to expand their influence on the issues of our time. Too often Congress ducks tough political issues by passing vague legislation which deals with a politically explosive subject matter, leaving it to the courts to fill in the blanks. In this, Congress is as guilty as judicial activists of perverting the dichotomy between the legislative and the judicial functions. Another practice

20. *Id.*

21. THE FEDERALIST NO. 47, at 232 (James Madison) (David Wootton ed., 2003).

22. Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), in 15 THE WRITINGS OF THOMAS JEFFERSON 276, 277 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904).

23. *Id.*

24. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in SELECTED SPEECHES AND WRITINGS 284, 290 (First Vintage Books, Library of Am. ed. 1991).

that expands judicial power is the increasing tendency on the part of Congress to criminalize acts that are not wrong in themselves, but which are actually civil or administrative matters that have been traditionally handled as such. Now, because of special interests providing pressure in such fields as the environment and health care, Congress has attached criminal penalties to regulatory statutes. This often results in unfair situations, branding as criminals citizens who had no idea they were committing a crime.

President Ronald Reagan, who understood very well the Constitution and the role of the judiciary, explained how judicial activism is incompatible with democratic government. At the installation of Chief Justice William Rehnquist and of Associate Justice Antonin Scalia in 1986, he said,

The Founding Fathers were clear on this issue. For them, the question involved in judicial restraint was not—as it is not—will we have liberal or conservative courts? They knew that the courts, like the Constitution itself, must not be liberal or conservative. The question was and is, will we have government by the people?²⁵

There are other reasons why an independent judiciary, faithful to the Constitution, is what we need, and why it is so wrong for the Senate minority to seek to move the courts in a different direction. It is not only lack of constitutional authority that makes judicial activism a serious problem. Courts are not designed to make broad public policy, as Lincoln and Jefferson pointed out.²⁶ Necessarily their decisions are bounded by the facts of particular cases. Likewise, they do not have the opportunity, as does a legislature or policymaking body, to review a broad array of testimony from witnesses concerning the possible ramifications of their decisions. And thus, when federal judges exceed their proper role of interpreting the law, the result is not only infidelity to the Constitution, but often very poor public policy.²⁷

25. Ronald Reagan, Remarks at the Swearing-In Ceremony for William H. Rehnquist as Chief Justice and Antonin Scalia as Associate Justice of the Supreme Court of the United States (Sept. 26, 1986), in 2 PUB. PAPERS 1268, 1270 (1986).

26. See *supra* notes 22-24 and accompanying text.

27. Edwin Meese III, *Putting the Federal Judiciary Back on the Constitutional Track*, 14 GA. ST. U. L. REV. 781, 784 (1998).

We have seen a lot of examples of this over the past fifty years. For example, in 1979, the Supreme Court for the first time held that Title VII of the Civil Rights Act of 1964²⁸ permitted private employers to establish racial preferences and quotas in employment, despite the fact that the clear language of that act said that it shall be an unlawful employment practice for any employer to discriminate against any individual because of his race, color, sex, or national origin.²⁹ We have the courts creating a new right to welfare assistance by inventing out of whole cloth a property right to welfare benefits.³⁰ The result is that those who are deemed ineligible for welfare are still allowed to receive welfare benefits during the time that this ineligibility is being proved, and the government cannot recover these benefits from those to whom they were improperly given.³¹

In the area of criminal prosecution, the *Mapp*³² and *Miranda*³³ cases changed entirely the requirements imposed on the states to conform to a federal standard of criminal procedure that was not at the time required by the Constitution. Indeed in the *Miranda* case, we have this judicial activism compounded by subsequent judicial “bootstrapping.” In 1974, the Supreme Court specifically said that the *Miranda* requirements were a prophylactic set of rules not required by the Constitution.³⁴ Yet in the last decade, in the *Dickerson* case,³⁵ the Court declared that the *Miranda* rules had been used for so long, they are now a constitutional mandate.³⁶ There is no greater example of the Supreme Court inserting into the Constitution something that was never there.

28. 42 U.S.C. § 2000e *et. seq.* (2000).

29. *See* *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

30. *See* *Goldberg v. Kelly*, 397 U.S. 254 (1970).

31. *See id.*

32. *Mapp v. Ohio*, 367 U.S. 643 (1961).

33. *Miranda v. Arizona*, 384 U.S. 436 (1966).

34. *Michigan v. Tucker*, 417 U.S. 433, 444-46 (1974) (stating that the *Miranda* Court “recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected,” and later stating that “the police conduct at issue here did not abridge respondent’s constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege”).

35. *Dickerson v. United States*, 530 U.S. 428 (2000).

36. *Id.* at 444 (concluding that “*Miranda* announced a constitutional rule that Congress may not supersede legislatively”).

Well, I am sure that many of us are fully aware of one of the more egregious cases that the Court has been involved in. That, of course, was *Roe v. Wade* in 1973.³⁷ It is perhaps the most instructive example of what happens when courts engage in judicial activism. Besides the fact that this case generated public turmoil and protest marches on both sides, it illustrates the reality that once a court starts legislating, it cannot stop. So every few years, the Court has had to engage in further judicial legislation to modify or explain what it did in the original *Roe* decision.³⁸ I think the best way to show how this decision was wrong is to contrast it with another situation that the Court handled in a constitutional manner. That is the issue of physician-assisted suicide.³⁹ Interestingly enough, these are two very similar decisions on life, but at opposite ends of the spectrum. In *Roe v. Wade*, the Court arrogated to itself a basic moral issue, which should have been left to the people's representatives, at a time when various states were handling this in different ways. By making this a federal issue, the Court took it out of the hands of the state legislatures that represented the people of their respective states. By contrast, in the case of physician-assisted suicide, the Court looked in the Constitution and found nothing there on that subject.⁴⁰ It, therefore, left to the states and elected representatives the decisions on this issue. So today we do not have marches on physician-assisted suicide, we do not have the controversy, and we do not have the need for continuing legislation by the Supreme Court because the issue has been left to the people's representatives, with different states handling the matter in different ways.

These two cases demonstrate that matters of basic morality, on which the Constitution is really silent, should belong to the people. More recently we have seen judicial activism in the cases relating to homosexual conduct, *Romer v. Evans*⁴¹ and *Lawrence v. Texas*.⁴²

37. 410 U.S. 113 (1973).

38. For cases interpreting or modifying *Roe v. Wade*, see, for example, *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983); *Harris v. McRae*, 448 U.S. 297 (1980); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

39. See *Washington v. Glucksberg*, 521 U.S. 702 (1997).

40. See *id.* at 728 (“[O]ur decisions lead us to conclude that the asserted ‘right’ to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause.”).

41. 517 U.S. 620 (1996).

42. 539 U.S. 558 (2003).

Supreme Court intervention has produced some of the most incomprehensible and convoluted decisions you will find in any of the law books. Again it reveals how wrong the Court is when, through judicial activism, it takes away from proper legislative bodies these particular issues. In Massachusetts today we observe the same kind of judicial activism in regard to homosexual "marriage."⁴³ We have also seen that when the moral issues are left to the people, they invariably come up with the right answer, as they did in Hawaii and Alaska when the question of same-sex marriage came up in those particular areas.⁴⁴

The federal courts have not been content to usurp just legislative authority. Too often we have seen judicial activism involved with executive authority as well. Today we have courts running prisons, schools, mental institutions, and even police departments. When the federal courts thus exert prerogatives that, under the Constitution, belong to the executive and legislative branches, we find indeed what can be described as a tyranny of the judiciary that violates the checks and balances that are contained in the doctrine of separation of powers. Such activism results in poor public policy. It reduces the people's control of government. And, as a result, it diminishes our freedom.

That is why it is a serious matter when senators, sworn to uphold the Constitution, use the subversion of Senate rules and ruthless intimidation to foster further incidence of judicial activism. That is what is really at stake in the battle for judicial confirmations today. The outcome of this controversy may not be decided until after the next election. But how the conflict comes out will determine whether we still have the kind of independent judiciary that is called for by our Constitution. In turn we will learn whether our nation and its citizens will still enjoy the freedom from judicial tyranny that our Founders gave us some 216 years ago.

43. See *Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

44. See Kevin G. Clarkson et al., *The Alaska Marriage Amendment: The People's Choice on the Last Frontier*, 16 ALASKA L. REV. 213 (1999); David Orgon Coolidge, *The Hawaii Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. HAW. L. REV. 19 (2000).