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The Threat Of Liberal Judicial Activism Reaches New Heights

By Lester Jackson

In making the case for judicial review, Chief Justice John Marshall pointed out that judges take a sworn oath to uphold the laws of the United States. Until last month, it would have been unnecessary to stress that he was obviously referring to actual laws, not the unfulfilled fantasies of a lone member of Congress. Nevertheless, on July 7, in a case largely ignored by the media, dissenting Justices Breyer, Ginsburg, Sotomayor and Kagan carried judicial activism to new heights by advocating a stay of execution on the basis of an imaginary law. They thereby revealed themselves to be so desperate to save barbaric murderers that they unashamedly and brazenly sought to apply un-enacted legislation introduced on June 14 by one senator, Patrick Leahy, with not a single cosponsor and by no representative at all. They had to know that this was not going to pass, because it had never been seriously considered in over seven years -- even when those least unlikely to vote for it controlled both houses of Congress and the presidency.

On May 20, 1994, Humberto Leal Garcia raped and murdered 16-year-old Adria Sauceda, whose skull he crushed and whom he left with a long stick protruding from her insides. Although he had lived in the United States since before he was two years old, Leal sought to avoid execution by taking advantage of the fact that he was a Mexican national who, he contended, should have been informed of a treaty right to Mexican consular assistance. No claim was made that he had in any way been prejudiced by lack of such assistance or that he was anything but clearly guilty as charged. (Indeed, he confessed when he was finally executed.)

A mere three years earlier, the Supreme Court had rejected an identical claim. Jose Ernesto Medellín, a Mexican national who had been in this country since preschool (4), had bragged about brutally robbing, raping, and murdering two girls, 14 and 16. The Court cited congressional refusal to pass a law required to enforce a consular consultation right. As stated by the Leal dissenters, the Court had "held that, because Congress had not embodied our international legal obligations in a statute, the Court lacked the power to enforce those obligations as a matter of domestic law." But they went on to assert that Leal's applications "do not suffer from this... legal defect" thanks to Leahy's bill.

It is noteworthy how easily the Leal dissenters slithered from lack of a statute to pending legislation, inviting the gullible to believe that the latter is a substitute for a duly enacted law. Their claim that it had a good chance of passing was obviously disingenuous, refuted by the lack of even one cosponsor and the failure to pass it since the need for it first became apparent seven years earlier.

The real aim of this artful exercise is transparent. Justices opposed to capital punishment (which has overwhelming public support) seek to sabotage it at every chance. Opponents routinely resort to absolutely anything to delay executions. There is no argument or ruse too preposterous (47) for them to try.

Here, the dissenting justices sought to grant "alien" murderers a right not possessed by citizen murderers: to call their "native" country's consulate even if, like citizens, they were raised and educated in the United States. This would be one more weapon to employ in the death penalty opponents' long term strategy of endless delay. If granted, would it surprise anyone if the same justices pivoted to seek a bar to executions of American citizen murderers on the equal protection ground that they lacked a right enjoyed by aliens?

In the end, the Leal case was shockingly significant, not because of its particular extremely gruesome facts barely touched upon here, but because of what it revealed about those at the apex of the legal system. Four justices proclaimed themselves disposed to implement, as if actual law, any pending legislation that suits their fancy -- even if proposed by but one legislator, one percent of the Senate or 0.19% of the entire membership of Congress.

It is, of course, nothing new for critics, including justices themselves, to accuse the court of rewriting law, twisting and torturing it beyond recognition. But, until now, there was at least a pretense of making decisions based on actual law. Resort to such pretense is bad enough!

Now, however, the United States is but one justice away from a majority so arrogant and incapable of embarrassment as to see no need even to resort to this pretense in usurping the democratic process. We are perilously close to five imperial justices so hell bent on ramming their unpopular personal values down the throats of an unwilling public that they will enforce laws that they themselves acknowledge do not exist -- in this case, for the benefit an unspeakably barbaric murderer.

Really! Do such justices have anything but contempt for the rule of law, contempt for the legislative process, contempt for the Constitution that clearly specifies that process, contempt for self-government and, ultimately, contempt for the American people?

And is the time coming for the people to reciprocate that contempt? Repeatedly, justices have expressed concern for the Supreme Court's legitimacy and public confidence, lest they be perceived as merely imposing their own subjective views rather than impartially and objectively applying the law. What will happen to that legitimacy and confidence if more Leal type dissenters are appointed?

The Leal dissent has exposed, in very raw form, just how critical the 2012 election will be. The nation is one justice away from a majority that sees no need even to pretend adherence to actual law in seeking to impose their own subjective values.

From time to time, there are calls for making Supreme Court nominations a major issue in presidential elections. These calls have never been really met.

This time, the presidential candidates should wake up. They should be talking seriously and often about justices who have contempt for the law, so that the American people will also wake up to the danger.

If they don't wake up in 2012, they surely will wake up in 2013 to a Supreme Court that a majority of Americans do not respect because the majority of the Court lacks respect for them. In turn, that will call into question the very legitimacy of judicial review for which Chief Justice Marshall so eloquently laid the groundwork.