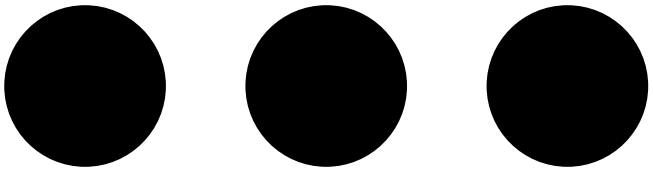
# Judicial Supremacy to Judicial Lunacy? A Judge Challenges the Supreme Court's Supreme Folly

"Our judges are as honest as other men, and not more so," wrote Thomas Jefferson in 1820. "They have, with others, the same passions for party, for power, and the privilege of their corps." While this is true, one Judge Laurence Silberman may be an exception.



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Silberman, of the United States Court of Appeals for the District of Columbia Circuit, emerged from relative obscurity recently when he penned a dissent in the case of *Tah v. Global Witness Publishing, Inc*. In this case, which involved defamation, Silberman went far beyond disagreeing with how the majority applied a 1964 "landmark" Supreme Court opinion, *New York Times Co. v. Sullivan*. He also challenged the very "notion of Supreme Court infallibility," as one commentator put it.

In a nutshell, the '64 opinion held that succeeding in a defamation claim required a plaintiff to prove not just that statements made publicly were false and damaging, but that they were motivated by malice (read more about the case here and here.) As a result, public officials basically stopped suing the media because, unlike in Britain, it's now notoriously difficult to win a defamation case in the United States.

Silberman finds that troubling. But what bothers him even more is that, as he pointed out, "Justice Thomas has already persuasively demonstrated that *New York Times* was a policy-driven decision masquerading as constitutional law. As with the rest of the opinion, the actual malice requirement was simply cut from whole cloth."

Unfortunately, this isn't uncommon. For the SCOTUS has long been, it appears, buying cloth in bulk. Thus did Silberman not only complain that the '64 opinion must be overturned as it's "a threat to American Democracy," but go further.

In fact, he "makes plain his disdain for Justice Kennedy's contention that 'criticism of the Court is tantamount to an attack on the Constitution,'" relates commentator Andrea Widburg. "Instead, 'I readily admit that I have little regard for holdings of the Court that dress up policymaking in constitutional

garb.' It's that kind of dissimulation that is 'the real attack on the Constitution.' Indeed, '[t]he notion that the Court should somehow act in a policy role as a Council of Revision is illegitimate.'"

Silberman is merely stating a simple fact: It isn't the courts' role to in essence "make law" by imposing their own extra- or un-constitutional biases from the bench. Yet generally ignored is that this problem of judicial adventurism cannot realistically be mitigated without first tackling judicial supremacy.

Judges' "privilege of their corps," which Jefferson warned about, was perfectly epitomized by Kennedy's "criticism of the Court = an attack on the Constitution" line. We should just respond, "Nice try."

It's natural for individuals and institutions to want to place themselves beyond criticism, but this is worse than un-American (are the justices royalty?). It also smacks of self-deification. It has often been joked that the Supreme Court is not the Supreme Being, but only God is beyond criticism because only He is infallible in all facets. The rest of us require the iron that sharpens iron that is legitimate criticism.

Kennedy's self-deification is also a quite bold attempt at flipping the script. The SCOTUS has essentially been attacking the Constitution for at least a century via its unconstitutional opinions. Now, to avoid being called out on this, Kennedy claims that criticizing this abuse (or any other SCOTUS trespass) is an attack on the Constitution! Talk about projection.

But let's talk about protection — of the courts and from them. It's no surprise that many justices may want to be beyond criticism, for they've long been beyond accountability and beyond control. Judicial supremacy will have this effect.

Long our status quo, judicial supremacy is the standard whereby court decisions will constrain not just the parties in a given case or even just (regarding SCOTUS decisions) the whole judicial branch, but the legislative and executive branches as well.

To fully grasp the problem with this, consider a warning from James Madison, the "Father of the Constitution." He said that having the judicial, legislative, and executive powers all vested in one entity is the very definition of tyranny. Well, now consider what former ambassador and government affairs expert Alan Keyes once explained (I'm paraphrasing):

The courts obviously have their judicial power. Yet if they can strike down a law in contravention of lawmakers' will — essentially making themselves a super-legislature of last resort — then they've arrogated to themselves the legislative power as well. Moreover, if they can tell the executive branch that it *must or may not* execute a given action, regardless of that branch's convictions about the action's constitutionality, they've also then arrogated to themselves the executive power.

Ergo, all three powers are then vested in one body, the courts. Goodbye, checks and balances.

Worse still, this tyrannical power (using Madison's description) is wielded by the one governmental branch that's *beyond the people's reach*. The legislators are elected as is the president (the executive branch), so the people can hold them accountable at the ballot box. But federal judges are appointed — *for life* — meaning, they're effectively shielded from accountability.

I wrote "effectively" because the Constitution does give Congress the power to impeach judges, eliminate rogue lower federal courts, and limit the appellate jurisdiction of the SCOTUS. Yet this power isn't exercised, and it won't be for a simple reason:

Legislators like it when the courts "settle" hot-button, controversial issues so they don't actually have to

take a stand. In other words, lawmakers are outsourcing decisions they should make — and be held accountable for — to the branch of government that cannot be held accountable. Nice con, huh?

Having unaccountable people make our laws is obviously dangerous, and this is why Jefferson warned that the judicial-supremacy standard would make our Constitution a *felo de se*, an "act of suicide." But what can we do?

First realize that judicial supremacy is not "the law of the land." *It's not in the Constitution*. Rather, the courts granted their absolute power *to themselves*, most notably in the *Marbury v. Madison* decision (1803). It's reminiscent of how San Franciscan Joshua Abraham Norton, disgusted with our political and legal systems (I can sympathize), declared himself "Emperor of these United States" in 1859. Only, nobody took him seriously.

So why do we take the judges who would be kings seriously? The Constitution does, of course, explicitly grant the SCOTUS (and lower courts created by Congress) the "judicial power." But here's the rub: It doesn't specify precisely what this power is.

In fact, according to Alan Keyes, with whom I discussed this matter, the Founding Fathers didn't elaborate on this anywhere. Thus does a simple conclusion suggest itself: They believed that what constituted the judicial power was self-explanatory. Yet it logically follows that if this is so, it's only because that power already existed and was well understood.

What was the Founders' understanding? They emerged from the British tradition, which had, of course, long included a legal system and judges. Here's what it didn't involve: ruling laws unconstitutional and then "striking them down."

After all, Britain didn't (and doesn't) *have a Constitution*.

In other words, British judges could take issue with a law and free someone charged under it. But they could not eliminate the law itself. This was the *default understanding of the judicial power*.

Now, if the Founders meant to radically change this — if they'd intended to grant American judges the unprecedented power to strike down law — wouldn't they have said so? Wouldn't they have stated, "The courts have the 'judicial power,' and understand what this actually means now" and then elaborate? That they didn't indicates that the "judicial power" was *what it had always been*.

That is, judges' rulings constrain the plaintiff(s) and defendant(s) party to the case in question, but they constrain no one else and *cannot alter law*.

The bottom line is that judicial supremacy appears a fiction, an extra-constitutional power enjoyed by a governmental branch that has neither the police nor the military to enforce it — and at the pleasure of the other two branches.

Late Justice Antonin Scalia alluded to this reality when he warned his SCOTUS fellows in his *Obergefell v. Hodges* (2015) dissent, "With each decision of ours that takes from the People a question properly left to them — with each decision that is unabashedly based not on law, but on the 'reasoned judgment' of a bare majority of this Court — we move one step closer to being reminded of our impotence."

It's high time the Court was reminded of its impotence. If we're unwilling to issue that reminder, then it signals that we suffer an impotence running far, far deeper than law.