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In Justice: Lessons on Legal Process from *Billy Budd, Sailor* *By Jesse Funk, Senior, Economics and English Minor*

The question of law's justice is as old as civilization. Edicts of tyrants and of juries alike can demonstrate a perversion of justice. Systems of law purpose to safeguard the innocent from abuses of power. Do not understand law as a just end, but rather as a means to justice. Law is the real process; justice is the ideal end. To demonstrate this causality, Herman Melville, in his 1891 novella *Billy Budd, Sailor*, uses the age-old metaphor of a ship and her captain, Edward Fairfax Vere, bearing sole responsibility for her administration and mission. Vere's role as sole judge on the warship demands that he discipline his men in accordance not only with the Articles of War, but also the traditions of the sea. On the H.M.S. *Bellipotent* in the summer of 1797, Vere exercises this role in the case of a sailor, Billy Budd, who strikes and kills the master-at-arms, John Claggart. A drumhead court martial convicts Billy of mutiny and sentences him to hang. During the trial, Vere acts as witness, defense counsel, and adjudicator, conduct that aborts a just verdict.

Determining the justice of Vere's conduct requires an understanding of justice as a virtue. In Plato's *Republic*, Socrates claims that an act's justice derives from the act's goodness in itself and its consequences. This definition is transformed by Jeremy Bentham, founder of the philosophy of Utilitarianism, which sets forth "the principle of utility" mandating the action causing "the greatest amount of happiness for the greatest number of people." Common law systems, adopted by Britain and later the United States, are based on the synthesis of these two philosophies. Judges, the enforcers and interpreters of law, use statutes the legislature passes as a foundation for precedent. The vagueness of statutory law allows judges to apply principles of law to diverse cases with extenuating and mitigating circumstances. The alternative, a civil law system, punishes *per se* offenses with the same severity as crimes with intent. The distinction between these two systems is important because it is readily seen that only common law is structured to promote justice.

The Articles by common law tradition allow a captain, while detached from the fleet, to commission courts martial in cases where, Richard Weisberg claims, "expediency dictated that the usual procedures not be followed" and where the 1757 Royal Navy Articles of War provided for "all other crimes not capital . . . which are not mentioned in this act, or for which no punishment is hereby directed to be inflicted." Vere explicitly draws his power to call the drumhead court for the former reason. He believes the *Bellipotent's* crew to know "what penalty for that [Billy's crime] should follow" and would, in response to "arbitrary discipline," "revert to

the recent outbreak at Nore.” Vere also invokes common law in his choice of the number of judges. The Articles prescribe that a minimum of five judges sit in any court martial. Vere chooses only three, his first lieutenant, sailing master, and captain of marines, because of their position relative to him in command. He also takes the step of “reserving to himself . . . the right of maintaining a supervision of” the proceedings because he was “the one on whom the ultimate accountability would rest.”

At trial, Vere dropped all pretense of reliance on common law. He admonishes his fellow judges, “one of two things must we do – condemn or let go,” leaving them with no discretion in sentencing. He is technically correct in his reading of Article 21. The statute itself leaves no room for a court to mitigate the sentence of a person who “shall strike any of his superior officers.” However, this crime carries the gravest sentence enumerated in the Articles, more so than mutiny itself, and it is not surprising that the judges are inclined to deviate from the prescribed punishment. In fact, a legal tradition, established in 1757, “again made discretionary” the death penalty in Article 21 cases. This tradition, coupled with the judges’ discretion in punishment in other violations, legitimizes the judges’ lenient tendency.

Vere chooses to circumvent, through common law, the strict reading of the Articles regarding procedure and then refuses to allow the judges to do so in sentencing. Picking and choosing philosophies of law, common or civil, mucks the process and creates a situation in which justice cannot be fully served. The duplicitous and inconsistent action Vere takes precludes, in the opinion of the judges, a just outcome for Billy Budd.

It could be argued that Vere’s procedural errors were less the result of twisted jurisprudence than of negligent ignorance and, if the errors were volitional, justice is served regardless. Vere’s sporadic applications of common and civil law during the court martial support this theory. To assert Vere’s decisions were based in ignorance is false for two reasons. Vere “had a marked learning toward everything intellectual” and was familiar with the Articles that “were read publicly at the commissioning of new ships” and “at least once a month.” The latter claim strikes at the heart of the matter. Billy is convicted of a *per se* violation of the Articles. Vere recognizes this fact in an exchange with the captain of marines who postulates, “Budd proposed neither mutiny nor homicide.” Vere’s response is twofold. He affirms the captain of marines posit and adds Billy will be acquitted “at the last Assizes.”

Billy is accused of mutiny, defined in Article 19, by Claggart, before Vere, when Billy strikes Claggart. Vere, an eyewitness, realizes, in the interest of fairness, this precludes him from adjudicating the case. Vere understood the propriety of separation and, before eschewing it by becoming a judge, avers he is “but a witness, little more; and I should hardly think now to take another tone.” Instead of excusing himself from the cabin, Vere proceeds to admonish the judges they are “acting not as casuists or moralists,” but “as the king’s officers” with a duty to enforce the king’s law. Vere allows his authority as captain to eclipse his necessary function as witness.

Vere’s dual role is at odds with principles of judicial propriety. As the only witness, he must act as a source of fact without which there would be no evidence of a crime but Claggart’s body. This knowledge predisposes him to a finding of guilt. Knowing the impropriety of acting as both witness and judge, law and justice dictate he recuse himself. Law, as a process, cannot achieve its end without just principles.

Vere’s justice fails the Socratic, Utilitarian, and legal tests for justice. His conduct does not cause a result good of itself, nor for the results, or for the good of the ship as a whole. Vere departs from traditional legal interpretations and, through creative jurisprudence, prevents the process of law from occurring. Vere’s justice leads instead to the judges’ “sad assent” to the will

of their captain and the execution of a man innocent, by circumstance, of the crime accused. Instead of directing a verdict, Vere could have allowed them to mitigate the sentence, clearly legal, or waited to refer the matter to fleet. Fear of a hypothetical mutiny does not outweigh the rights of the accused, especially when death is the result. Vere's conduct results in the deaths of Billy Budd and of justice.

Executive Power and Wartime: History Supports Current Actions *By Amanda Spracklen, Junior, French and Political Science Major*

Since the birth of the United States Constitution, the exact powers of the president have been widely debated. Article II, which prescribes the qualifications, roles and duties of the president, does not include a list of enumerated powers as does Article I, which lays out the powers of the Congress. There is little doubt that the framers of the Constitution desired a weak executive after their experiences with a strong executive, but they knew after the failure(s) of the Articles of the Confederation that it was necessary for a stronger executive to oversee the federal government. Historian Clarence Berdahl has characterized Article II as "the most defective part of the Constitution," with its "loose and general expressions enabling the President, by implication and construction, 'either to neglect his duties or to enlarge his powers.'" Even with all of its ambiguity, Article II does afford the president the appearance of a strong executive with two key provisions, according to political scientist Thomas Colin: "the designation of the president as commander in chief and the broad duty to 'take care that the laws be faithfully executed.'" The ambiguity of the section which lays out the presidency has led to the present day controversy over the constitutionality of the current President, George W. Bush.

But Bush is not the first executive to broadly interpret his roles as the president, indeed, the trend started at the beginning of our new government with President George Washington. Washington, says Colin, "established the precedents of firing Cabinet officers, vetoing legislation on constitutional grounds and controlling foreign policy," thus setting the precedent for future presidents to use the powers granted to them by the Constitution to create more powers for themselves. Even one of the foremost proponents of strict interpretation, Thomas Jefferson, violated the procedures put forth by the Constitution in approving treaties, when he "unilaterally" approved the Louisiana Purchase. Following in the trend of historic presidents establishing more powers for themselves, Abraham Lincoln commenced military action to save the Union by raising an army, declaring a blockade of Southern ports, and unilaterally suspending *habeas corpus*. Even though his decision to suspend *habeas corpus* was later deemed unconstitutional in *Ex parte Milligan* (1866), Colin argues that Lincoln "always believed he had followed the law." These examples and several more prove that George W. Bush is not the first president to overstep the powers designated to the president in Article II of the Constitution.

George W. Bush was in the infancy of his presidency when the terrorist attacks of September 11, 2001, occurred. The focus of his presidency was immediately altered towards fighting a war against terrorism. In order to complete this mission, Bush had to assert what is now known as "maximum presidential authority." Three days after the attacks, Congress issued the Authorization to Use Military Force against those responsible for the September 11 attacks, a move which was proposed by the President's administration. The subsequent approval by Congress solidified Bush's role as commander in chief. In late October of 2001, Congress passed the USA PATRIOT Act, which, says Colin, "increased penalties for terrorism and expanded federal law-enforcement powers in terrorism-related investigations." Even though Congress

oversaw the passage of the Authorization to Use Military Force and the USA PATRIOT Act, the President was still directing the path he desired Congress to take in establishing a wartime situation in our country.

President Bush is currently under scrutiny for his broad interpretation of executive powers during wartime. There is much question as to the constitutionality of the National Security Agency (NSA) wiretaps, which have been done with neither the consent of Congress nor the courts due to issues of national security. There is also much question as to whether President Bush and his administration have the authority to hold prisoners at Guantanamo Bay in Cuba without their being informed of the reason for their detention. In a similar fashion, there is question as to the treatment of prisoners, as there have been numerous reports of torture of suspected terrorists. Lastly, there is doubt as to the foresight of the war on terrorism, since it seems to be a war without borders or a clearly defined enemy. Opponents frame Bush's actions as dictatorial and single-minded, which would go against what the framers intended when creating the role of the executive. Bush and his supporters believe that such actions are necessary to defend the country, and that had the framers been exposed to such acts of hatred by foreign nationals, they would support his decisions. Bush claims that as commander in chief during wartime, it is necessary to have expanded powers in order to maintain national security to prevent further attacks.

The vagueness of Article II is especially apparent with regards to the executive's power during time of war. Clarence Berdahl argues that "if the general conception of executive power in the United States is somewhat vague and open to various interpretations," it is therefore "especially true of the nature and extent of executive power with regard to war." Berdahl's research holds that there are two classes of powers under the Constitution: peace powers, which have restrictions within the Constitution, and war powers, which are "limited only by the laws and usages of nations." Thus, he says that there are no "express limitations in the Constitution" of war powers, and that the "extent to which the exercise of these war powers is vested in the President or in Congress is a matter of some dispute." As the lone director of a branch of government, the president holds an advantage in gaining the public's approval of their dominant use of war powers as opposed to the 535 members of Congress.

The Supreme Court has weighed in on the power of the executive during wartime in *Youngstown Sheet & Tube Co. v. Sawyer* (1952). In this case, President Harry Truman seized the nation's steel mills to prevent the possibility of a strike during the Korean War, because he feared that, as political scientist Jack Fruchtman has put it, "without steel production, war effort would be seriously hampered and national security jeopardized." Thus, the steel companies argued that because "no act of Congress and no provision of the Constitution authorized the President to seize the mills," Truman's act was therefore unconstitutional. The legacy of this case came from Justice Robert H. Jackson's concurring opinion, which, Colin says, "set out a three-tiered structure for judging the scope of the president's power" and thus is "recognized as the starting point for any constitutional decision in the area." In sum, the president's actions are more likely to be determined valid if the Congress stands behind and supports his policies.

President Bush has argued that his decision to order electronic surveillance and military tribunals is supported by Congress, as evidenced by the Authorization to Use Military Force passed on September 14, 2001, in addition to his inherent powers as commander-in-chief. In contrast to the steel-seizure case, there is controversy as to whether Congress approved the president's actions. Opponents claim that Congress prohibited such actions by passing the Foreign Intelligence Surveillance Act in 1978 and that he ignored the provisions of the Uniform

Code of Military Justice or the Geneva Conventions, governing detainee hearings. President Bush and his administration have firmly emphasized that detainees are not prisoners of war. Accordingly, they do not fall under such conventions; they are, instead, designated as illegal enemy combatants, a term supported by the Supreme Court in *Ex parte Quirin* (1942), which sustained the president's use of increased wartime powers.

Even though their powers during wartime have been overshadowed by those that the president believes himself to have, Congress should not blame a strong executive for its lack of influence, for Congress itself granted the president more power with the War Powers Act of 1973. The act permits the president to make war unilaterally for up to ninety days before he needs specific congressional consent. After ninety days, American troops are seemingly in a war and the president needs congressional approval. The War Powers Resolution has sometimes been seen as a blank check to increase executive power. With it, Congress may have forfeited its right to carefully deliberate on this matter, which was supposed to include both the Congress and the chief executive. The President's powers expanded with the passage of the War Powers Act by Congress, thus proving support for an executive-led war.

As opposed to Congress's blank check granting the President greater war powers, the Supreme Court maintains that it is keeping a watchful eye over the powers of the executive. In *Hamdi v. Rumsfeld* (2004), Justice O'Connor, writing for the Court, ruled that "we have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." The Supreme Court states that decisions such as *Youngstown* support their claim of upholding the rights of citizens, since the case limited the president's power to order the directions of the federal government to those only with Congress' consent. Notably, Justice Clarence Thomas's dissent notes that since the President is "acting pursuant to the powers vested in the President by the Constitution and with explicit congressional approval," the judicial branch lacks the capacity to "second-guess" the decision of the Executive Branch. With two new members on the Court (Chief Justice John Roberts and Justice Samuel Alito), it will be interesting to see how future cases relating to George W. Bush's questionable policies hold up, if related cases come before the Supreme Court.

The Constitution is quite vague with regards to the powers of the president, with the only mention of his wartime powers being his role as commander in chief of the armed forces. Because of the ambiguity of Article II, the role of the president has always been regarded controversially, especially by the other branches of government. Currently, the president's policies are under scrutiny with regards to their constitutionality, but historically, they hold a valid base in law and precedent, supporting the idea that the President is working within the boundaries of the Constitution. The check that Congress was intended to provide over the powers of the president in declaring war has been removed, allowing the nation to be committed to wars led by the president. With the legislature bowing down to the president, Congress should not be surprised about President Bush's use of expanded wartime powers, since the members of Congress themselves have authorized the statutes and treaties to allow President Bush to lead the United States to war.

The Necessity of Counsel

By Christina Savage, Senior, Psychology Major

The federal and state judicial systems in the United States are founded on the principle that an individual is innocent of a crime until proven guilty. There are several protections

embedded in judicial procedures to uphold this principle including the right to counsel. The Sixth Amendment of the Constitution guaranteed this right in criminal proceedings within the federal government's jurisdiction. Over time, this right was extended to state criminal proceedings under the Due Process Clause of the Fourteenth Amendment, which is the idea that an individual may not be denied life, liberty, or property without access to the procedures and protections of the Courts. Accused persons, as innocent individuals, are entitled to counsel because defense attorneys act as historical, procedural, and substantive safeguards within the judicial system.

The contemporary American view of the right to counsel is influenced by English history and historical ideology. In their book *In Our Defense*, Ellen Alderman and Caroline Kennedy argue that England's practice of the right to counsel dates to colonial times when England granted counsel to persons accused of a misdemeanor, but denied it to those charged with a felony or treason. In response to this backward procedure, twelve of the thirteen colonies reversed this practice by providing counsel for criminal cases, especially serious crimes. Such a modification demonstrates that American citizens have historically acknowledged the importance of counsel for the accused. In regards to the revolutionary spirit of the time, one may presume that this protection was enlisted to prevent the government from arresting and convicting citizens of crimes, without providing them the chance to adequately defend themselves. It is imperative for accused persons to have access to counsel as a procedural safeguard in judicial proceedings as well.

One primary reason that counsel is essential for the accused is because defense lawyers serve as objective and supportive guides through the United States' adversarial legal proceedings. Criminal trials are adversarial in that they pit the prosecution against the defense and seek one victorious side, which is usually decided by a jury. Traditionally, the burden of proof falls on the shoulders of the prosecution, thus the prosecution uses all of its available resources to obtain a "guilty" verdict. In a time that probably feels like a crisis in the eyes of the suspected individual, lawyers can provide the rational and objective attitude necessary to comprehend the entire situation. Without a defense attorney, the accused are left to their own devices, which are probably inadequate. A proper defense requires the knowledge and skills that a lawyer has spent years acquiring. Typically, lawyers attend four years of college, graduate from law school, and pass the state bar exam before obtaining a license to practice. Although defendants may be quite intelligent and innocent, it is likely that they will not possess enough knowledge of the law to present the best defense possible. Defendants will not have the necessary knowledge regarding various court procedures, such as filling briefs, jury selection, and access to legal clerks to help with research. Furthermore, the average person is probably undereducated with respect to legal codes and pertinent case law. These ideas were reflected in the Supreme Court decision of *Powell v. Alabama* (1932) when the Court stated, "The defendant lacks both the skill and knowledge to prepare his defense, even though he may have a perfect one."

The Court expanded the right to counsel to all persons, regardless of wealth, in state criminal proceedings in *Gideon v. Wainwright* (1963). In *Gideon*, a layman was accused and found guilty of a non-capital felony. When Gideon asked for counsel, he was informed that Florida law only permitted counsel for indigent persons charged with capital crimes. As Justice Black's opinion of the Court indicated, there is a pervading belief that defense lawyers are necessary in all criminal court cases. No respectable hospital would allow an untrained man to perform open heart surgery; similarly, the judicial system cannot allow an untrained individual to present an adequate defense against the prosecution without assistance of counsel. There may be

instances in which individuals served as their own defense attorney and were successful, but those cases are too rare to diminish the importance of the right to counsel.

A second reason that it is imperative to have counsel is demonstrated through protection during police interrogations. The purpose of counsel during police interrogations pertains to having an attorney while being detained and during questioning. Once again, the attorney has more knowledge and acumen to critically review the conduct of police officials than does the average citizen. Lawyers are assumed to have a better understanding of the weight of evidence, analyze the charges, and determine the legality of the arrest. A portion of the Warren Court's opinion in *Miranda v. Arizona* (1966) emphasized the importance of counsel prior to and during police questioning. The Court asserted that the presence of counsel at this time thwarts police coercion, ensures that a suspect provides an accurate statement, and makes sure the police correctly record the statement. Such precautions are designed to protect the accused and provide the prosecution with a sound foundation for the case. An attorney's presence at the start of the criminal procedure prevents the defendant from later persuading the jury that the police used abusive tactics, which could contaminate the state or federal government's case during the trial. Any blatant errors due to police conduct can be addressed prior to trial, if there is an attentive defense attorney at the start of the judicial procedure. Consequently, it will save prosecuting attorneys precious time and taxpayers' money if they are aware of damaging evidence that may taint the outcome of their case before deciding to involve the courts. There are some instances in which it would behoove the defendant not to demand a jury trial; in these stances a defense attorney should be present to advise the accused. Although some may argue that this violates the moral standards of the society, one must realize that an accused person has the right to plead guilty. If the states and federal governments expect to have the power to decide individual's freedom, they must abide by legal doctrines and restraints that prevent them from infringing on people's constitutional rights. How can individuals in society be expected to adhere to laws when their leaders refuse to? Lastly, counsel is essential for accused persons because lawyers protect the other rights that are promised to the accused.

The Supreme Court has long recognized that the right to counsel is the foundation on which the accused may exercise other rights they are entitled to. From the Fourth to Eighth Amendment, individuals are protected from a variety of infringements that pertain to some part of the criminal proceedings including protection from unreasonable search and seizures, self-incrimination, and cruel and unusual punishment. These amendments guarantee a public trial by jury, confrontation of witnesses, and no double jeopardy. Numerous cases have been decided based on these issues surrounding these amendments; thus the use of counsel is imperative to swiftly sift through case law that pertains to the accused individual's case. In addition, attorneys are probably better versed in the constitutional rights of individuals and legal codes, which will allow them to make sure that a suspect's rights are not violated. As advisors, attorneys explain and clarify to suspects the rights that they are entitled to during the entire judicial process. For example, the always changing definition of cruel and unusual punishment is probably not a concept that the average person follows; however, it may have an enormous role in a death penalty case involving an individual between the age of sixteen and eighteen at the time the crime was committed, as in *Roper v. Simmons* (2005).

Access to counsel is a fundamental right because lawyers are expected to know and protect the rights of an accused person; counsel should act as the defendant's ally throughout the legal proceedings. Moreover, counsel for a suspect is a substantive safeguard to the judiciary because lawyers are meant to protect the liberty of these individuals and force the prosecution to

prove the individual guilty. Some lawyers have dedicated their career to studying law; therefore, they are an asset to persons who feel lost once they enter the legal realm. Finally, counsel is a substantive right in terms of assuring a “fair trial” for defendants. Alderman and Kennedy argue that the right to a fair trial is implied in the Sixth Amendment since it lists several rights that the accused is entitled to, such as a speedy and public trial, an impartial jury, and being informed of the charges. Conferring with a lawyer is usually the best way that a defendant, who has the prosecution and police officials against him, can obtain assistance in reviewing and challenging the charges against them.

By working with educated and trained professionals, ordinary individuals can be advised against detrimental actions toward their case, such as self-incrimination and insufficiently challenging evidence against them. Finally, defense attorneys assist an accused person by seeing that they are not overwhelmed by the demanding nature of the judicial system.

Does Catholic Belief Interfere with Judicial Reasoning, Or are Democrats Picking on Catholics?

By Cara Demski, Senior, Business Administration Major

In September 1960, just two months before he was elected President of the United States, John F. Kennedy famously told the Greater Houston Ministerial Association:

I believe in an America where the separation of church and state is absolute; where no Catholic prelate would tell the President--should he be Catholic --how to act, and no Protestant minister would tell his parishioners for whom to vote; where no church or church school is granted any public funds or political preference, and where no man is denied public office merely because his religion differs from the President who might appoint him, or the people who might elect him.

For the first time in American history, the United States Supreme Court is predominately Catholic. Five of the nine justices practice Catholicism including Chief Justice Roberts and Justices Alito, Scalia, Thomas, and Kennedy. This makes Democrats very nervous because both parties equate Catholics to pro-life, and fear that this may reverse the *Roe v. Wade* decision, and make abortion illegal.

However, the Constitution puts religious belief off-limits when public officials are selected. It states in Article VI: “No religious test shall ever be required as a Qualification to any Office or public Trust under the United States.” For this reason, religious beliefs are off-limits in deciding cases. What role, then, should a judge’s faith and moral beliefs play in his or her role as an impartial adjudicator?”

Then why is there uproar of the religion of the justices of the Supreme Court now? This is because President Bush “lucked out” in his presidency of nominating two justices (John Roberts and Samuel Alito), and he is blamed on nominating very conservative nominees, when in fact, he appointed very capable and experienced politicians.

Roberts’s impressive legal and political career began with his A.B. from Harvard, and then a J.D. from Harvard Law School in 1979. After that, he has carried many prestigious positions such as law clerk for Justice Rehnquist, associate counsel for President Reagan, and was appointed to the United States Court of Appeals for the District of Columbia before he took his seat on the Supreme Court as Chief Justice on September 29, 2005. Alito received his A.B. from Princeton University and a J.D. from Yale Law School in 1975. He also has a lengthy list

of highly regarded positions including, Assistant U.S. Attorney, Assistant to the U.S. Solicitor General, and he was appointed to the U.S. Court of Appeals for the Third Circuit before he took his seat as Associate Justice on January 31, 2006.

Sen. Charles Schumer of New York panned the president's pick, Samuel Alito, when he commented that his "initial review of Judge Alito's record shows that there's a real chance that he will, like Justice Scalia, choose to make law rather than interpret law and move the court in a direction quite different than it has gone." Add to this a good deal of published concern over the devout Catholicism of Chief Justice Roberts's wife, and her membership in a pro-life organization, and it is clear that the Democrats are being urged to play the religion card.

Yes, the Catholic Church is a defender of life. It has even issued statements that sound suspiciously like a certain famous declaration of self-evident truth, that we are all created equal, with an unalienable right to life. However, the Church is also resident in a world where Supreme Court precedent has tragically elevated personal preference over any once-proud declaration of right. What does the Church expect of public officials in such an environment?

First, public officials should be observant of church teaching in one's personal life. The church asks the Catholic justices and their fellow parishioners to pray to end abortion and, in social outreach, to create the conditions that make it less pressing. The church seeks to convert individual souls to the love of God; it has no motive to compel either. Yes, the late Pope John Paul II admonished Catholic public officials to work legislatively to limit abortion, something that even most Democrats proclaim to be doing at least during general elections. Nevertheless, there is not one church teaching demanding that a judge or justice exceeds the scope of his office to undo, on solely religious grounds, the public law of abortion or any other matter.

According to Vatican 2003's Doctrinal Note on the Participation of Catholics in Political Life, "When political activity comes up against moral principles that do not admit of exception, compromise or derogation, the Catholic commitment becomes more evident and laden with responsibility. In the face of fundamental and inalienable ethical demands, Christians must recognize that what is at stake is the essence of the moral law, which concerns the integral good of the human person."

In this controversy, it is fitting to recall St. Thomas More, known to history for resigning the chancellorship of England when he failed to persuade Henry VIII not to declare himself head of the Church. More is revered as a martyr for dying "the King's good servant, but God's first." As the patron saint of lawyers and public officials, More is far better remembered for his earnest efforts, at every turn, to avoid inescapable conflict among law, faith and public duty.

Catholics do not have to explain themselves for judging or questioning the legality of abortion or the death penalty. These are matters of constitutional, not moral, authority. When More was asked why he did not arrest a man directly for being "bad," he replied, though he set man's law "far below" God's, he was most certainly "not God," and he wanted to draw "attention to that fact." "The currents and eddies of right and wrong, which others find such plain sailing," More said, "I cannot navigate. . . . However, in the thickets of the law, oh, there I am a forester. I doubt there's a man alive who could follow me there, thank God."

There is no match for Chief Justice Roberts or Justice Alito in the "thickets of the law," and the Senate Democrats should evaluate them, and the other nominees, on their merit and avoid picking a fight with them because of their religion.

The Rehnquist Court: An Examination of Its Jurisprudence

Mike Dodd, Junior, Law and American Civilization Major

In 1986, after he was confirmed as Chief Justice of the United States, William H. Rehnquist along with Antonin Scalia serving as a solid additional conservative vote began to shift the Supreme Court to the right on a number of issues – most notably states rights. Rehnquist quickly established himself as a premier voice of conservative strict construction in the nation. In doing so, he raised methodological concerns with the intent of the constitutional framers. He conceded that *stare decisis* was, according to political scientist Tinsley Yarbrough, “The preferred course, because it promotes the evenhanded, predictable, and consistent development of legal principle, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” For Rehnquist, the structural features of the Constitution – the separation of powers between the different branches of the national government and the federal relations between the national government and the states – are a more appropriate area for judicial interpretation and intervention than are the individual rights features. Though Rehnquist believed that the Court has an important role to play in securing individuals their clear and traditionally recognized rights, such cases raise the danger of the Court acting undemocratically to impose its own moral preferences. By contrast, the Court is better able to play the role of neutral arbiter and legal interpreter in the context of disputes over the structural features of the Constitution. In such disputes, Rehnquist emphasized both the intrinsic powers of the presidency and the distinctiveness of legislative and executive powers while also demonstrating a firm commitment to the authority of the Court. In evaluating presidential power, Rehnquist was centrally concerned with protecting the chief executive’s ability to successfully perform his constitutional duties.

Rehnquist’s approach to individual rights is perhaps best seen as a response to the perceived excesses of the Warren Court and the jurisprudential tendencies it encouraged. In his controversial memorandum to Justice Robert Jackson, a young Rehnquist wrote that “in the long run it is the majority who will determine what the constitutional rights of a minority are. One hundred and fifty years of attempts on the part of this Court to protect minority rights of any kind...have been sloughed off, and crept silently to rest.” He echoed and elaborated those thoughts in a 1980 address, explaining that “it is no more accurate to say of our Court that it is the ultimate guardian of individual rights than it is to say that it is the ultimate guardian of national authority or of states’ rights.” The people of this country are the source of all governmental authority, and they have made their own constitutional balancing between the power of government and the rights of individuals. Most claims of individual constitutional rights arise in cases involving state or local governments. Rehnquist was mistrustful of judges substituting their judgments of contested constitutional rights for the judgments of popularly elected representatives and this urged a strong presumption on constitutionality for acts of government challenged in such cases.

On the eve of Justice Rehnquist’s elevation to the Court’s center seat, the justices rejected portions of the Warren Court’s decision in *Swain v. Alabama* (1965) by holding in *Batson v. Kentucky* (1986) that prosecutors must provide racially neutral explanations for their peremptory challenges to prospective jurors of the defendant’s race. In separate dissents, Chief Justice Burger and Justice Rehnquist emphasized the peremptory challenge’s long history and rejected the contention that its use reflected the sort of racial bias against which the equal protection clause was directed. Observed Rehnquist,

In my view, there is simply nothing “unequal” about the State’s using its peremptory challenges to strike blacks from the jury in cases involving black defendants, so long as such challenges are also used to exclude whites in cases involving white defendants.

Rehnquist may have been most successful in reinvigorating interest in federalism on the Court. The most dramatic statement of Rehnquist’s commitments to federalism came in his 1976 majority opinion in *National League of Cities v. Usery* (1976). In *NLC*, he argued that “we have repeatedly recognized that there are attributes of sovereignty attaching to every state government that may not be impaired by Congress.” In doing so, he built on one of his own earlier dissenting opinions. In *Fry v. United States* (1975), Rehnquist objected to the application of federal wage controls to the states’ employees. Federal law took precedence over state law when they both regulated private “persons or enterprises,” but not when the federal regulation is “of the state itself.” *NLC* was formally overturned in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), though in dissent Rehnquist claimed confidence that its principles would “in time again command the support of a majority of this Court.”

The Commerce Clause is the source of federal power over the national economy. Recognizing the interrelatedness of almost all parts of the economy, the Supreme Court had upheld every assertion of federal power under the Commerce Clause since 1937. In 1995, that changed. In *United States v. Lopez* (1995), the now-usual 5-4 majority, against in a Rehnquist opinion, struck down a federal law criminalizing the possession of guns in a school zone because the justices saw no “economic” transaction in the situation and there was no specific congressional finding of an effect on interstate trade. For the first time in the modern era, in *United States v. Lopez* (1995) and *United States v. Morrison* (2000), the Court concluded that Congress had exceeded its enumerated powers in seeking to regulate private activity. Whatever their merits in distinctively legal terms, these decisions clearly advanced the conservative political agenda.

Rather than turning back the clock on freedom of expression, in several landmark cases – especially *Hustler v. Falwell* (1988), *Texas v. Johnson* (1989) dissenting, and *Rosenberger v. Rector and Visitors of the University of Virginia* (1995) – the Court continued to spell out the commanding theme of modern free-speech jurisprudence: the state shall not deliberately repress expression, however extreme, based on its content or viewpoint. It even propelled this principle into cyberspace with libertarian Internet decisions like *Reno v. ACLU* (1997), which established that, when it comes to sex talk, grown-ups can take care of their own children and need not be treated like children. At the level of principle and rhetoric, shifting majorities on the Court have thus far taken the high ground on speech, even when the hard-right justices, such as Chief Justice William H. Rehnquist, have filed curmudgeonly dissents. But for fascinating political reasons, even the authority worshiping hard right of the Court occasionally finds itself defending free speech. The ferocious right-wing backlash against “political correctness” and campus hate speech codes in the late 1980s and the 1990s gave free speech grievances an unprecedented halo in conservative circles during the Rehnquist era.

Justice Rehnquist contended in essence that congressional intent regarding the establishment clause’s meaning should be determined by reference to related actions of the clause’s framers, regardless of its language or the framers’ personal views regarding the proper relationship of the church to the state in a constitutional system. In 1985, Justice Powell filed a brief concurring opinion in *Wallace v. Jaffree* (1985). This overturned an Alabama law authorizing a daily period of silence for meditation or voluntary prayer in the state’s public schools. The separate opinion in *Jaffree* that had most aroused Justice Powell’s reaction was the

dissent Justice Rehnquist filed in the case. Rehnquist focused primarily on the historical record, which convinced him that the establishment clause only “forbade establishment of a national religion, and forbade preferences among religious sects or denominations. . . . The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion.”

Chief Justice Rehnquist held the belief that a jury or judge could properly consider the harm a defendant’s crime had caused in determining whether to impose the death sentence, and victim-impact statements were an appropriate source of such evidence. The victim in *South Carolina v. Gathers* (1989), for example, had been “an out of work, mentally handicapped individual, perhaps not, in the eyes of most, a significant contributor to society, but nonetheless a murdered human being,” observed Rehnquist, unmindful perhaps of the extraordinary sympathy – and scorn for his killer – such a pitiful victim would be likely to arouse in a jury. Rehnquist’s dissenting opinions as an associate justice also demonstrated a focus on restricting the constitutional protections established by the Eighth Amendment prohibition of cruel and unusual punishment on limiting the scope of federal *habeas corpus* rules establishing a defendant’s right to challenge the legal basis of his or her imprisonment. The Eighth Amendment is particularly important because it has been used to attack the constitutionality of capital punishment. During the brief period between 1972 and 1976 during which the administration of the death penalty was often declared to violate the Eighth Amendment, Rehnquist joined the dissent in *Roberts v. Louisiana* (1976), which argued that mandatory imposition of the death penalty does not amount to cruel and unusual punishment.

By all accounts, William Rehnquist was a more effective chief justice than Warren Burger, especially in terms of his relations with his colleagues. If their colleagues needed any reminder of the contrasts between the irascible Burger and the unflappable Rehnquist, moreover, they got it shortly after the new chief had taken his seat. Even when turning down the request of a colleague with whom his jurisprudential differences were pronounced, Rehnquist’s tone and approach were generally solicitous and diplomatic.

The views expressed in these essays reflect the opinions of the writers only, and not the views of Towson University or the Prelaw Society.

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