



Separation of Powers

by John D. Whitaker

My guess is that if Alexander Hamilton had a boogiemanager, he would have looked a lot like House Majority leader Tom DeLay when he threatened the judges responsible for the various Terri Schiavo decisions by saying, "The time will come for the men responsible for this to answer for their behavior." He was of course speaking about the multitude of federal and state court judges that presided over the seemingly endless hearings concerning Mrs. Schiavo's care in Florida. Mr. DeLay was not necessarily griping about the process, but more about the inability of Congress to control the result. Whether he was threatening the judges with the Coast Guard or eternal damnation remains a question of some debate, but the fact remains that when one branch of our government starts threatening another branch of our government we all better watch out.

Alexander Hamilton once said "Give all the power to the many and they will oppress the few, give all the power to the few and they will oppress the many." It was over 200 years ago when Hamilton envisioned the dispute currently raging between the executive and legislative branches of government attempting to lean on the judicial branch of the government for doing exactly what it was designed to do.

Hamilton and the other Federalists were convinced that our society could not rely upon civic virtue to protect individual rights. Philosophers at that time defined civic virtue as a citizen's ability to set aside personal interest if it was necessary to serve the common good. This view was not without support. Historically, King George had used bribes and special favors to control elections and create legislation to reward special interests. The state legislatures were already engaged in interpreting the common good in all sorts of nutty ways. For example, the New York Constitution of 1777 declared that equality must be extended to Jews, but denied to Catholics. The Massachusetts legislature passed a Con-



stitution in 1780 which extended equal protection and the right to hold office only to Christians.

The Federalists argued that because the interests of this new country were so diverse and also because the state legislatures had such differing ideas of the common good, our government must be created in such a way as to avoid giving one branch of government absolute power over another. They designed the Constitution so that each branch of government had separate powers which were subject to a variety of checks and balances on each so that the rights of individuals would not be lost. This protection was specifically designed so that one group of people, even a majority of people, would not be able to deny the constitutionally protected rights of the individual.

There is now a chorus of politically energized and connected people who have devised a strategy to limit the independence of the judiciary envisioned by the framers and encompassed in the doctrine of separation of powers. The rallying cry for this crowd is that we must somehow get control of these "activist judges" who are standing in the way of our legislatures. Whether there is in fact a group of judges who are going beyond their authority is a matter we should be concerned about, but my sense is that this problem is overblown. My fear is that this inflamed rhetoric is causing collateral damage to the entire doctrine of separation of powers. Slogans are fine, but they are not always accurate. You can simplify an argument so much that it becomes simply wrong.

Federal Judges are appointed for life so that they can remain free from the heavy handed self-righteous influence of temporary majorities. They work hard and deserve our respect. Never has it been more important for our citizens to stand behind our judges and help to protect their independence. The next time you hear the term "activist judges" remember that this is just a slogan designed primarily to stop judges from doing their jobs.

The Wyoming State Bar does not certify any lawyer as a specialist or expert. Anyone considering a lawyer should independently investigate the lawyer's credentials and ability, and not rely upon advertisements or self-proclaimed expertise. This informative column is brought to you by John Whitaker who practices personal injury and criminal law throughout Wyoming. He can be reached at JDWTL@aol.com or by calling his office in Casper at 265-6204.