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Judges with a rubber stamp

Richard Rahn November 4, 2013

Do you think the government is too big, taxes too much and regulates your lives more than it should? Polls consistently show that most Americans think there is too much government. Nevertheless, those in the majority who say they want smaller government continue to vote for people who ultimately give them larger government.

All too many are willing to vote for those politicians who promise more benefits to some to be paid for by others, without understanding that they will eventually become the "others." The American Founders clearly understood the danger. As Thomas Jefferson said, "When the people realize they can vote themselves benefits, all is lost."

What has gone wrong and why? In an incisive, new book, "Terms of Engagement: How Our Courts Should Enforce the Constitution's Promise of Limited Government," Clark Neily lays much of the blame at the feet of the judiciary. He notes the Founders opted for a constitutional republic rather than a direct or indirect democracy because they understood that "government is not your friend." "As far as the government is concerned, it is your boss, setting policies and edicts that you will obey. Between that awesome power and you stands the Constitution." Mr. Neily is a senior lawyer at the Institute for Justice, and is perhaps best known for success in the Heller case, where the Supreme Court held that the Second Amendment protects an individual's right to own guns.

Mr. Neily's core thesis is that too many judges have abdicated "their duty to enforce constitutional limits on government power." The evidence is overwhelming that judges tend to side with government against the people. Despite the concern about "activist" judges inventing new rights out of whole cloth, the bigger problem is the judges who fail to uphold the Constitution and individual liberty. Chief Justice John G. Roberts Jr.'s tortured reasoning in upholding Obamacare is a prime example.

Mr. Neily notes: "Between 1954 and 2002, Congress enacted 15,817 laws, of which the Supreme Court struck down 103 — just 0.67 percent. The Court struck down an even smaller portion of federal administrative regulations — about 0.5 percent — and a still smaller proportion of state laws, just 454 out of 1 million passed, or less than 0.05 percent. In any given year, the Supreme Court strikes down just three out of every [5,000] state and federal laws passed." This abdication of responsibility to uphold the Constitution and individual liberty has resulted in the often tyrannical regulatory state, which sucks away our economic vitality. According the annual

Economic Freedom of the World Report, the United States has fallen from No. 1 in the world in 1980 to a miserable 38 in 2011 in protecting legal and property rights.

A number of economic and legal commentators, such as Mark Levin and yours truly, have advocated constitutional amendments to try to correct the erosion of fundamental economic and personal liberties. Mr. Neily is a skeptic about the usefulness of new constitutional amendments until the behavior of judges can be changed. The Founders understood the tendency of both the executive and legislative branches of government to tax, spend and regulate in order to enhance those branches' own power at the expense of the people. Under the system of checks and balances the Founding Fathers devised, the courts were expected to be a check on the excesses of the other branches of government. Clearly, the courts have failed.

The Constitution gave very limited powers to the federal government, while giving the states wide latitude. National defense, the federal courts, limited national infrastructure (e.g., river-navigation improvements, etc.), the Centers for Disease Control, the National Institutes of Health, the U.S. Patent and Trademark Office, and even the U.S. Postal Service are clearly constitutional as would be understood by people who can read the English language. Most of the other federal government activities, though, including the budget-busting welfare, medical and income "entitlement" programs, are only allowed because judges have deferred to the legislative branch, rather than correctly ruling that these activities, if desired, should be done by the states.

Mr. Neily relates amusing and frightening specific case examples of the lengths to which many judges have gone in order to protect the government and other special interests at the expense of the entrepreneur, whether it is the license requirement to be a flower arranger in Louisiana or an interior decorator in Florida, the consumer required to pay higher than world prices for sugar, and the taxpayer, who must fund the unconstitutional excesses of the political class.

Judges who are active in upholding liberty and property rights are often labeled activist or radical, and thus are less likely to be confirmed than those who are viewed as "passive" (i.e., not willing to stand up to Congress or the executive branch). All is not lost, though. Books like Mr. Neily's, organizations like the Institute for Justice, and the new media are increasingly shedding light on, or even ridiculing, judges who fail in their fundamental constitutional responsibilities — encouraging signs that may lead to more responsible and courageous behavior.