Martin Garbus's New Book On The United States Supreme Court: Winds Of Change

The Editor interviews ***Martin Garbus****, Partner, Davis & Gilbert LLP.*

Editor: Mr. Garbus, you can look back on a distinguished career. Can you share with our readers some of the high points?

Garbus: I have argued before the United States Supreme Court four times. I have represented many of the major writers and publishers in America. I have been involved in some of the leading intellectual property lawsuits over the years, and I have also tried about 200 jury cases. I have written five books and am midway through my sixth, to be released next year, which is about the chances for a rule of law in China.

Editor: Your fifth book, then, *The Next 25 Years – The New Supreme Court And What It Means For Americans*, has just been published. For starters, what prompted you to write it?

Garbus: An awareness that, with Justices Roberts and Alito being added to previous Republican appointees, we are looking at a conservative lock on the court for, perhaps, the next 25 years. The current Republican ascendancy began in the mid-1970s, during the second half of Chief Justice Burger's stewardship. It was solidified during the Reagan era under Chief Justice Rehnquist.

Turning to the next 25 years, the three youngest members of the Court are Roberts, Alito and Thomas, and it is not unreasonable to expect that they will serve for the next quarter-century. Those three and Scalia, 69, and Kennedy, 70, constitute a bloc which, if not always in step, trends in a conservative direction. The two judges who are most likely to step down are Stevens and Ginsberg. If we see, say, four judges step down over the next 25 years, and if we see them replaced by an equal number of Democrats and Republicans, two and two, that five-person lock on the Court continues. Also, this President may have another appointee, as successor to Ginsberg or Stevens.

If you look at the way our legal system operates, the Court will do what their predecessors have done. They will undo the work of an earlier era – and of a Supreme Court with a different political orientation – and they will create their own body of precedents. For the Roosevelt Court that meant an expansion of economic rights. The Warren court expanded personal rights. Since the mid 1970s the Court has been expanding the power of states and curtailing individual rights.

Editor: You note in your introduction that we are supposed to be a country with a rule of law, but that often we are a country that honors rule *by* law – a profound difference. Would you elaborate?

Garbus: Rule *by* law describes a legal system that a government uses to obtain the results it seeks. The rule *of* law describes a legal system in which the law, as a kind of transcendent concept, undergoes interpretation through a graduated, increasingly refined framework. Totalitarian and authoritarian countries often have rule by law systems. In America, we have a system of rule by men and by law. Justice Frankfurter noted that judges bring their own biases and beliefs into the decision-making process, and Oliver Wendell Holmes went even further in saying that 80 percent of any decision is made on the basis of personal prejudices. The law is not immutable. It is *men* applying what they, in good faith, believe the law to be.

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There are two interesting, and opposing, concepts in operation here. Justice Brennan refers to the *living Constitution* – a document that is to be interpreted in accordance with the times, and based on the issues, that the Court faces now. The Founding Fathers could not have anticipated the decisions to be made on invasion of privacy as a result of terrorist attacks on the United States and our response – the Patriot Act, for one – to those attacks. Those who adhere to the *Constitution-in-Exile* concept – they are often referred to as *textualists* or *originalists* – look at the document at the time it was written and at what they think was the intention of the Founding Fathers. The clash is more complicated than a straightforward liberal-conservative or Democrat-Republican one, but it tends to play out that way in the public arena.

Editor: This is not the first time that the Court has permitted ideology to inform some of its decisions. In the years leading up to the Civil War, a Southern-dominated Court actually contributed to the rancor that ultimately resulted in war. And in the 1930s the Court actively opposed FDR's New Deal legislation. What is different about this court?

Garbus: In the first place, I do not believe that the Court has ever been perceived by so many as a political body as it is today. Secondly, the traditional pattern of appointing judges of considerable maturity – Oliver Wendell Holmes is a good example – has been replaced by the practice of appointing much younger people. Of course, people live longer today. For both of these reasons the length of service tends to be much longer than it was in the past. One of President Bush's legacies will be a Court where the conservative trend will dominate for the next 25 years. If the coming years see a liberal Congress or President, the existence of a conservative Court augurs for clashes among the three branches of government.

What is new is the length of time that a Court now sits. Should the Justices of the Supreme Court have lifetime appointments? Justices have sat for 34 years. I cannot imagine the Founding Fathers ever having envisioned someone sitting on any court of law for that long. But changing the appointment length requires a Constitutional amendment and of that there is no possibility today.

Editor: You make a number of very strong points, including the assertion that our seeming inability to respond effectively to the events of September 11, propelled by a combination of nationalistic and religious fervor, is leading to restrictions on democratic rights and toward an authoritarian government.

Garbus: The conservative view is that of a unitary presidency, whose incumbent has all manner of powers in the foreign policy arena. He can decide on incarcerating foreigners, on how they are to be treated, whether they must be tried, the conditions of their incarceration, and so on: the Guantanamo issues. To this day, not a single person who has been held at Guantanamo has been convicted. I think it is worth noting that when Justice O'Connor sat on the Court as the swing vote, some of President Bush's assertions of presidential power were not supported by the Court. I think, in her absence, the Court is much more receptive to according the President extraordinary powers.

With respect to domestic affairs, we have the Patriot Act, NSA wiretapping, governmental scrutiny of bank accounts, and so on. As the war on terrorism goes on, I see a future with a serious diminution of civil liberties at no gain to our security. The issue is not whether we are safer with these new laws, because it is clear they make us less safe. I hesitate to think what will occur if we suffer another attack.

Editor: What about the President's use of "signing statements" to reject legislative enactments with which he disagrees.

Garbus: Other Presidents have used signing statements. No one has used them to the extent that President Bush has. He claims the signing statement should be used to interpret a law. This is wrong. It defies what the Constitution has placed exclusively into the hands of Congress. Whether the Court will reject it is another matter.

Editor: You note a departure from Jefferson's success in privatizing religion and secularizing politics in pointing to the injection of religion into the political discussion by a coalition of conservatives, evangelicals, fundamentalists *and the United States Supreme Court*.

Garbus: President Bush's faith-based initiatives are at issue here. Over the past few years a staggering amount of money has been transferred by the U.S. government to religious organizations. More money has gone to religious organizations in the last five years than in all the 231 years since the country was founded. The law had been that any religious organization in receipt of governmental funding could not proselytize. That is not the case today. I have a case that will be before the Supreme Court in three years which challenges the right of any religious organization with such funding to require its employees to sign a declaration of faith or accept the organization's view on a whole litany of issues, including abortion.

A second thing that makes an enormous impact is the case of *Zelman v. Harris*, which involves the voucher system. In that case the Court said that if the state wishes to provide money to a family for the purpose of putting a child into private schools, including religious schools, that is now permissible. As a consequence, federal dollars are being used to fund religious institutions.The privatization of education includes the transfer of public money to religious schools at the expense of public educational institutions. I was astonished at the decision in this case.

Editor: And the role that foreign law might play in Supreme Court decisions?

Garbus: Justice Scalia believes that foreign law is entirely irrelevant. Justice Kennedy and others believe that there are international norms, and they believe that it is relevant to consider such norms.

Editor: But even a politicized Court must pay attention to the precedents.

Garbus: Robert Bork and I have debated on all kinds of issues, and there are many things on which we disagree. One of the things we agree on, however, is how overstated the importance of precedent is. A discussion of how essential precedent is plays an enormous role in any Supreme Court nomination process. In point of fact, nearly *any* case can be distinguished. In 2006, for example, two cases came up involving a *voluntary* integration of a school district, one that involved selecting students for a particular school on the basis of race. The Court is going to declare this unconstitutional, and when it does, this means the end of integration. *Brown v. Board of Education* will be distinguished on the basis of different facts. I think the same thing is going to happen with *Roe v. Wade*.

Editor: What is on the Supreme Court agenda – and what are you most concerned about – over the next couple of years?

Garbus: In the larger arena, I think we are seeing a major shift with respect to individual rights. In closing, let me mention something that is of particular concern to me. *Baker v. Carr* and *Reynolds v. Sims* are the cases that establish the principle of one man, one vote. The first represented a retreat from the Court's "political question" doctrine and determined that reapportionment issues present justiciable questions. That means that a federal court can look at a voting district and determine if areas have been gerrymandered to enhance one political position and dilute another. The Supreme Court has said it will look at this issue. I am very concerned that the Court is going to begin to step out of a number of battles on the ground that the issues presented are "political."

Please email the interviewee at mgarbus@dglaw.com with questions about this interview.